Supreme Court of the United States

OCTOBER TERM, 1969

No. 270

ROBERT M. BRADY,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

CHRONOLOGICAL LIST OF PLEADINGS, HEARINGS AND ORDERS

	Date	Pleading
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3.	May 8, 1959	Transcript of sentencing
4.	September 20, 1967	Motion to vacate sentence and collaterally attack judgment, pursuant to Title 28, Sec. 2255, U.S.C.A.
5.	September 20, 1967	Motion for leave to file and proceed in forma pauperis, without prepayment of costs
6.	September 20, 1967	Affidavit in support of motion for leave to proceed without prepayment of fees, in forma pauperis
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11.	January 19, 1968	Transcript of proceedings of January 28, 1959
12.	March 13, 1968	Order for writ of habeas corpus ad testificandum for Robert M. Brady
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	Date	Pleading
15.	March 20, 1968	Hearing on motion pursuant to 28 U.S.C., Sec. 2255, before Hon. H. Vearle Payne, United States District Judge, sitting without a jury
16.	March 25, 1968	Respondent's proposed findings of fact and conclusions of law
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26.	December 17, 1968	Opinion and decision of the United States Court of Appeals for the Tenth Circuit
27.	January 23, 1969	Mandate of the United States Court of Appeals for the Tenth Circuit to the United States District Court for the District of New Mexico
28.	March 11, 1969	Application for extension of time to file petition for writ of certiorari
29.	March 13, 1969	Order extending time to file petition for writ of certiorari

Date	Pleading
30. April 16, 1969	Docketing of petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit, and motion for leave to proceed in forma pauperis, in the Supreme Court of the United States
31. May 19, 1969	Response to petition for writ of certiorari
32. June 23, 1969	Petition for writ of certiorari granted

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No.: 7269

Cr. No: 19847
USDC, New Mexico

ROBERT M. BRADY, APPLICANT

vs.

UNITED STATES OF AMERICA, WARDEN J. T. WILLINGHAM, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENTS

MOTION TO VACATE SENTENCE AND COLLATERALLY ATTACK JUDGMENT PURSUANT TO TITLE 28 SECTION 2255 U. S. CODE AS ANNOTATED—Filed September 20, 1967

State of Kansas)
County of Leavenworth) ss
United States Penitentiary)

Applicant, Robert M. Brady brings before the court a Motion as above entitled, predicated upon the basis of the Statute, 28 U.S.C. 2255, and claims of a judgment obtained in violation of his constitutional rights, provided in the Due Process clauses of the United States Constitution.

The sentence and judgment as attacked herein was entered in the United States District Court for the District of New Mexico (Hatch, J.) in Criminal Cause 19847, May 8, 1959, whereby judgment entered upon a plea of Guilty, and sentence adjudged to place applicant in the care of the Attorney General of the United States for a period of Fifty (50) years. The sentence in said cause has thereinafter been reduced to 30 years in the custody of the Attorney General of the United States, pursuant to an order as entered by Executive Clemency

in 1965. Upon this basis the venue is proper under 28 USC for the determination of this matter.

Applicant alleges and says that judgment and sentence in the criminal cause were obtained in violation of his due process rights as a citizen of the United States, in areas to wit:

1. The plea of Guilty as entered in Criminal Cause No: 19847, by this applicant was induced, and not entered freely and Voluntarily, upon these inducive factors:

(a) The Statute, 18 U.S.C. 1201, upon which the charge is based, required applicant to plead Guilty, and coerced said plea because it impared his free exercise of demanding a jury trial, as is guaranteed by Amendment 6 of the United States Constitution.

(b) That counsel as retained by applicant had in their purview of the evidence in the possession of the United States, unsurped the power of a jury, and did then and therebeing act as a jury, and did adjudge applicant guilty, and from pressures exerted by them upon applicant, they induced his plea of guilty.

(c) That certain representations were made to applicant by Counsel of a Co-Defendant and also a co-defendant that in return, for the tendering of a Guilty plea, certain efforts as to reduction of sentence and executive clemency would be undertaken in his behalf by the then Senator from New Mexico, Honorable Senator Chavez, and the then former Honorable Judge Chavez, of the United States District Court for the District of Puerto Rico, both of whom were blood relations of Co-Defendant Alfonso P. Tafoya.

2. That the trial court failed to fully comply with the requirements of Rule 11, Federal Rules of Criminal procedure, before accepting the guilty plea as

tendered in this cause of action, thereby rendering a Due Process violation of this applicants rights.

Therefore, upon these basis of unconstitutional conduct in the securement of the judgment and sentence in the Criminal Cause of action, this applicant asks that the court enter its order—granting the relief as sought, and further order his release from a current unconstitutional restraint.

/s/ Robert M. Brady
ROBERT M. BRADY
Applicant
U.S. Penitentiary
P.O. Box # 1000
Leavenworth, Kansas

I swear and affirm that the foregoing is true and correct to the best of my knowledge and belief

/s/ Robert M. Brady
ROBERT M. BRADY
Affiant

Signed and Sworn to before me this 13 day of September 1967 A.D.

/s/ Perry N. MacPee
Classification & Parole Officer
U.S. Penitentiary
Leavenworth, Kansas

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

* * * *

MEMORANDUM IN SUPPORT OF MOTION TO VACATE SENTENCE AND COLLATERALLY ATTACK JUDGMENT PURSUANT TO TITLE 28 SECTION 2255, U.S.C.A.—Filed September 20, 1967

In support of the Motion this Applicant saith to this court:

1. Venue is proper under the Statute, 28 U.S.C. 2255, as it was this court which imposed the sentence and judgment which is attacked by the Motion. In light of *Maez* v. *United States*, (C.A.N.M.) (1966) 367 F. 2d 139 this court is empowered to dispose of this cause upon its merits, as the propiortory venue is adequate.

2. Applicant has asserted two substantial allegations, upon which he claims relief. These allegations are concerned with the guilty plea, and a failure of the trial court to comply with a substantial rule of law before accepting the plea.

   It is appearing that the controverted basis of the allegations in the Motion, appear to fall under the teachings of *Romero* v. *United States*, 327 F. 2d 711; *Olive* v. *United States*, 327 F. 2d 646; and *Nichols* v. *United States*, 310 F. 2d 374, will require an evidentiary hearing with the production of the Applicant and also his co-defendant, so that appropriate testimony will be evinced in support.

3. Applicant has laid claim that his right to assert a trial by jury was impaired by the statute upon which he was charged being unconstitutional upon its face, because of the method in which punishment can be limited. The claim has been further enhanced that the statute upon its face coerces a guilty plea, which violates fundamental precepts of Due Process of Law.

   According to exhibit number one, we see that applicant in Criminal No. 19847 United States Dis-

trict Court For the District of New Mexico, was indicted and charged with a violation of 18 U.S.C. 1201. It is this statute upon which the claim for relief is laid in part.

18 U.S.C. 1201, plainly prescribes a possible penalty of death, if the kidnapped person is not liberated unharmed. While on another basis as can be attributed to the wording of the statute upon its face, "*if the verdict of the Jury shall so recommend*" that if a plea of Guilty is entered the death penalty is proscribed because there is no jury, when a guilty plea is accepted, and therefore there can be no recommendation. See *Waley* v. *United States*, 233 F. 2d 804, 806.

Therefore the wording of the Statute upon its face provides two standards of possible punishment, death for one who pleads Not Guilty, and a term for those who plead Guilty.

This double standard coerces a guilty plea and imposes a grave price to one who asserts his constitutional right to a jury trial of his peers.

The right to trial is assertedly an adherent part of due process, and is not a privilege but is an assertable right. This principal has been held consistantly that a right may be asserted, and the assertion of a right may not be made costly, for the exercise of the same. See *Griffin* v. *California*, 380 U.S. 609, 615 and *United States* v. *Wiley* 278 F. 2d 500.

The effect of the risk of assertion of the right to a trial by jury is death, and in the indictment of this cause of action shows rather conclusively that the government intended to introduce evidence in the area of the liberation of the kidnapped person unharmed. The language of the indictment is clearly revealed by the saying therein "*was not liberated unharmed.*"

These factors truly make any plea of guilty, which was tendered and accepted, truly not a voluntary

plea, but one which was obtained in degrogation of due process, by the putting of fear into applicant which coerces the plea, because he dare not assert his right to trial by jury.

Applicant makes an adequate observation that there was perhaps a recourse under Rule 23(a) Federal Rules of Criminal Procedure, wherein he could perhaps have asked for a bench trial in front of the trial court, however, this may be obtained only with the approval of the Government, c.f. *Singer* v. *United States* 380 U.S. 2U, 34-38, and although it would have been a discretionary matter the Trial Judge, if a bench trial had been had, would have been empowered to submit the issue of punishment to a jury in light of the teachings of *Seadlund* v. *United States* 97 F 2d 742, 748.

It is fully apparent that because this applicant tendered a guilty plea he gained immunity from Capital Punishment. In light of the teachings of *Jackson* v. *United States*, 262 F. Supp 716, which this applicant generally adopts as the basis of the effect of the statute upon his plea.

B. Applicant has advanced a rather radical claim in regards to his assistance of counsel, and the effect of them, the counsel upon his plea.

Applicants counsels, A. Gilberto Espinosa, and Robert H. LaFollett, Esqs., were in a position to which it is advanced, they unsurped the power of a jury, acted as a jury, and found this applicant guilty.

What are the novel consequences of the allegation as advanced?

Perhaps the most logical basis centers upon the question of competency of these two attorneys in the handling of this cause of action.

It is conceded that counsel was of this applicants own choosing, as discussed in *Taylor* v. *United*

States 238 F. 2d 409, but it is equally advanced that neither attorney had any experience in a Federal Criminal Cause of action of a Capital Nature, which will require a trial de novo of this issue in this court. See *Gibbs* v. *Blackwell*, 354 F. 2d 469.

Applicant had advanced to counsel on several occasions that he was not in fact guilty of the charge of the indictment.

Counsel after a perview of the evidence of the Government, and after failing to make any independent determination of the facts themselves, as suggested by the applicant, found the applicant guilty of the charge, and there every exertable effort from then on was devoted to the inducing of a Guilty Plea from the applicant.

It is appearing that counsel not only found their client guilty, after a preview of government evidence, but that they failed to give adequate information to this applicant of his rights. Due Process requires more than a perfunctory information as to applicants rights. See *Smith* v. *United States*, 238 F. 2d 925, revr. 137 F. Supp. 222, Mfd 240 F 2d 347.

It is advanced that perhaps the and the belief of this applicant, preview of the Governments evidence revealed a statement in chief as made by his co-defendant in this cause, and also a presumption that co-defendant was going to plead guilty to the charge.

Counsel had a sworn duty to fully protect his client, and to fully explain to him the consequences of the statement, exculpory in nature, and that under applicable law it would not be used as evidence against him in a trial, because in a joint trial it would have been impossible for him to cross-examine this rather incriminating statement. See *U.S.* v. *Echeles* 353 F. 2d 892, and also *Poe* v. *United States*, 233 F. Supp. 173, AFF'd 352 F. 2d 639.

Instead counsel used the basis and threat of co-defendants statement to further enhance their finding of Guilty of the applicant, and to induce a guilty plea from applicant.

C. That certain pressures were brought to bear upon this applicant by his co-defendant Alfonso Pedro Tafoya, and this co-defendants counsel have been advanced in chief. Applicant has advanced this claim so that he can reveal the psychological pressures which were brought to bear by these parties and the part they payed in the inducement of the plea.

Applicants co-defendant a member of a rather politically influential family in the State of New Mexico, advanced certain claims to the applicant in regards to favorable clemency, and reductions in sentence if a guilty plea was rendered, because of the intervention of the then Senator from the State of New Mexico, an Uncle of co-defendant Tafoya and another Uncle who had been United States District Judge for the District of Puerto, Rico. These claims further butressed by immenundos made by applicants own counsel and also Tafoya's counsel, can readily be seen to have a grave psychological effect upon a then 24 year old defendant, and the inducement which it would make to enter a guilty plea.

D. Applicant has advanced complaints that the guilty plea was induced by anyone of three factors. A finding that any one of the factors was an indication of inducement of the plea requires that the relief as sought be granted.

However, since inducements are advanced, they will, in the teachings implicated in *Putnam* v. *United States* 337 F. 2d 313, and *United States* v. *Cannon* 310 F. 2d 841, require an evidentiary hearing and trial de novo, because of a controversy of law and facts contemplated.

1. Implications of the claim advanced that Rule 11, Federal Rules of Criminal Procedure was not fully complied with before the acceptance of the Guilty Plea can be adduced from the record proper, and its inspection tendered with the accepted rules of law in regard to the same.

   Rule 11 requires an adequate determination be made before acceptance of the plea, and it is advanced that in light of the dictia as established by *Heidien* v. *United States*, 353 F. 2d 53, and *United States* v. *Mack* 249 F 2d. 421, that a full and proper determination was not made.

—Conclusion—

Wherefore it is appearing that the relief as sought is proper. Applicant therefore asks that the court to enter an order requiring the respondents to respond to the rule, for the production of Applicant before the court for an evidentiary hearing, and any other equitable relief as indicated.

/s/ Robert M. Brady
ROBERT M. BRADY
Applicant
U.S. Penitentiary
P.O. Box 1000
Leavenworth, Kansas

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 19847

Violation: 18 USC 1201 Kidnapping
Filed at Albuquerque, Jan. 27, 1959,
Wm. D. Bryars, Clerk.

Filed at Albuquerque, Sep. 20, 1967,
E. E. Greeson, Clerk.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT M. BRADY and ALFONSO PEDRO TAFOYA,
DEFENDANTS

INDICTMENT

The Grand Jury charges:

That the defendants described below participated in the same acts and transactions in the commission of the offenses described below:

On or about the 18th day of January, 1959, the defendants, ROBERT M. BRADY and ALFONSO PEDRO District of New Mexico, for the purpose of raping the Barbara Ann Steger at Albuquerque, in the State and TAFOYA, did unlawfully seize, kidnap, hold and abduct said Barbara Ann Steger and said defendants did knowingly hold, transport, and cause to be transported in interstate commerce the said Barbara Ann Steger from Albuquerque, in the State and District of New Mexico to El Paso, Texas, and that the said Barbara Ann Steger was not liberated unharmed.

In violation of 18 USC 1201.

A TRUE BILL:

/s/ S. L. Balling
Foreman of the Grand Jury

/s/ James A. Borland
JAMES A. BORLAND
United States Attorney

APPENDIX C

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF NEW MEXICO
..... DIVISION

Commissioner's Docket No. 13

Case No. 262

Received, U. S. Marshal's Office, Jan. 26 1959,
Albuquerque, New Mexico

Filed at Albuquerque, Jan. 27, 1959,
Wm. D. Bryars, Clerk.

UNITED STATES OF AMERICA

v

ALFONSO PEDRO TAFOYA, ROBERT BRADY

TEMPORARY COMMITMENT

of

.....

To the United States Marshal of the District of New Mexico:

You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within this district approved by the Attorney General of United States where the defendant shall be received and safely kept until discharged in due course of law. The above named defendant has been arrested but not yet fully examined by me upon the complaint of Cary Carlton SA FBI, charging that on or about 18 January, 1959 at Albuquerque in the District of New Mexico the defendant did unlawfully seize and kidnap Barbara Ann Steger, and transport her to El Paso, Texas, and during the course of said transportation did rape her several times in violation of U.S.C. Title 18

Section 262; the offense being a capital offense no bail is permitted in accordance with all my orders and directions relating thereto, and he has failed to do so.

Dated: 21 January 1959

/s/ [Illegible]
United States Commissioner

RETURN

Received this commitment and designated prisoner on Jan. 21, 1959, and on Jan. 21, 1959, committed him to Albuquerque, New Mexico City Jail, and left with the custodian at the same time a certified copy of this commitment.

Dated: 1/26, 1959.

/s/ Geo. W. Beach
United States Marshal
District of New Mexico

By .....
Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 19,847 Criminal

Filed at Albuquerque, May 8, 1959,
Wm. D. Bryars, Clerk.

UNITED STATES OF AMERICA

v.

ROBERT M. BBADY

On this 8th day of May, 1959 came the attorney for the government and the defendant appeared in person

and [1] by his attorneys, A. Gilberto Espinosa, Esquire, and Robert H. LaFollette, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] Guilty of the offense of interstate transportation of a kidnaped person, who was not liberated unharmed, in violations of Sec. 1201, Title 18, United States Code, as charged [3] in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] FIFTY (50) YEARS.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Carl A. Hatch
United States District Judge

The Court recommends commitment to: [6]

.....
Clerk

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

ROBERT M. BRADY, APPLICANT

—*vs*—

UNITED STATES OF AMERICA, WARDEN J. T. WILLINGHAM, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENTS

MOTION FOR LEAVE TO FILE AND PROCEED IN FORMA PAUPERIS, WITHOUT PREPAYMENT OF COSTS—Filed September 20, 1967

State of Kansas)
County of Leavenworth) ss
United States Penitentiary)

Robert M. Brady, applicant herein and in a Motion as attached hereto an annexed as a part hereof entitled 1.6. "Motion to Vacate Sentence and Collaterally Attack Judgment pursuant to 28 U.S.C. 2255," asks for adequate relief as is allowed by 28 U.S.C. 1915 (a) (d).

Applicant asks that the motion as attached hereto be filed and allowed to prosecute the same, without the prepayment of costs, in Forma Pauperis.

Applicant is of the belief that there is legal merit to the said action and that he is entitled to legal redress. The action is taken in good faith and presents substantial matters of law.

Wherefore upon the basis of the Statute, the affidavit in support is required thereby, which is attached as exhibit number one herewith, this applicant respectfully asks that the court enter its order for Leave to Proceed

in Forma Pauperis and direct that filing fees and costs of prosecution be charged to the United States.

/s/ Robert M. Brady
ROBERT M. BRADY, Applicant
United States Penitentiary
P. O. Box 1000
Leavenworth, Kansas

I, Robert M. Brady affirm that the foregoing is true and correct to the best of my knowledge and belief

/s/ Robert M. Brady
Affiant

Signed and Sworn to before me this 13 day of September 1967 A. D.

/s/ Perry N. MacPee
Classification & Parole Officer
U.S. Penitentiary
Leavenworth, Kansas

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

(Authorized 18 USC 4004 to Act as a Notary Public)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, APPLICANT

—*vs*—

UNITED STATES OF AMERICA, WARDEN J. T. WILLINGHAM, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENTS

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED WITHOUT PREPAYMENT OF FEES, IN FORMA PAUPERIS —Filed September 20, 1967

State of Kansas)
County of Leavenworth) ss
United States Penitentiary)

I, Robert M. Brady, applicant in a Motion For Leave to Proceed, and a further Motion to Vacate sentence and collaterally Attack Judgment Pursuant to 28 USC 2255, after first being placed upon my oath do declare to this court in Support of the relief sought:

1. I am an incarcerated prisoner at the United States Penitentiary at Leavenworth, Kansas, where custody is held by the Respondent Warden pursuant to Judgment entered by the United States District Court for the District of New Mexico, May 8, 1959.

2. That I am a poor person without funds in excess of $100.00, and that I have no other available means of collateral, bank accounts, checking accounts, or personal property, with which to prepay the costs of filing and prosecution in this matter.

3. That I am indeed a Pauper and entitled to the Relief as outlined in 28 USC 1915 (a) (d).

/s/ Robert M. Brady
ROBERT M. BRADY, Applicant

I, Robert M. Brady affirm that the foregoing is true and correct to the best of my knowledge.

/s/ Robert M. Brady
Affiant

Signed and Sworn to before me this 13 day of September 1967 A.D. at the Place as first written.

/s/ Perry N. MacPee
Classification & Parole Officer
U.S. Penitentiary
Leavenworth, Kansas

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

(Authorized 18 USC 4004 to Act as a Notary Public)

[Affidavit of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER—September 20, 1967

Petitioner having forwarded to the court a motion to vacate sentence and attack judgment in Criminal Cause No. 19,847, United States of America vs. Robert M. Brady, accompanied by an affidavit in forma pauperis, and the court having considered the same,

IT IS ORDERED the petition may be filed without prepayment of fees or costs or the giving of security therefor;

IT IS FURTHER ORDERED that John R. Cooney, P. O. Box 466, Albuquerque, New Mexico, is hereby appointed to represent the petitioner and return of respondent shall be served upon him.

DONE at Albuquerque, New Mexico this 20th day of September, 1967.

/s/ H. Vearle Payne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[File Endorsement (Omitted in Printing)]

No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

RESPONSE—Filed October 10, 1967

Comes now respondent United States of America and in response to Petitioner's motion, states:

1. That the plea of guilty was freely and voluntarily made by the Petitioner.
2. The record shows that the trial Court complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedures before accepting the guilty plea in Criminal Cause No. 19,847, *United States* vs. *Robert M. Brady*, United States District Court, for the District of New Mexico.

WHEREFORE, Respondent prays that Petitioner's motion to vacate the judgment and sentence in Criminal No. 19,847 be denied, as the records show that he is entitled to no relief.

JOHN QUINN
United States Attorney

/s/ Scott McCarty
SCOTT MCCARTY
Assistant U. S. Attorney

This will certify that a true copy of the foregoing pleading was mailed to opposing counsel this 10 day of October, 1967.

/s/ Scott McCarty
SCOTT MCCARTY
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 19,847 Criminal

Filed at Albuquerque, Jan. 19, 1968,
E. E. Greeson, Clerk

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT M. BRADY, ALFONSO PEDRO TAFOYA, DEFENDANTS

BE IT REMEMBERED, that on the 28th day of January, 1959, the above named defendants appeared in person in open court before the Honorable Carl A. Hatch, United States District Judge, at Albuquerque, New Mexico, the United States appearing by and through Assistant United States Attorney Joseph C. Ryan, and proceedings were had as follows:

TRANSCRIPT OF PROCEEDINGS

THE COURT: The offense charged in this indictment is that of kidnaping and also provides that the person alleged to have been kidnaped was not returned unharmed, which would make it possible, under the provisions of the law, if the jury so determined and you were found guilty, that the death sentence could be imposed.

Under those circumstances, I think you should have an [fol. 2] attorney to represent you. Do you have an attorney?

DEFENDANT: We do.

THE COURT: Where is he?

DEFENDANT: I don't know. Robert La Follette is our attorney.

THE COURT: Where is he?

DEFENDANT: I don't know, sir.

MR. RYAN: I don't know whether he was advised that they were coming up this morning.

THE COURT: Did you get in touch with him and tell him you were going to be here this morning?

DEFENDANT: We didn't know about it until just this morning.

THE COURT: Mr. Marshal, will you get in touch with Mr. LaFollette and tell him to get over here.

(A short time later on the 28th day of January, 1959, the defendants again appeared before the Honorable Carl A. Hatch, United States District Judge, at Albuquerque, New Mexico, accompanied by their counsel, Mr. Robert Hoath LaFollette, Attorney at Law, Sunshine Building, Albuquerque, New Mexico, and Mr. Gilberto Espinosa, Attorney at Law, Sunshine Building, Albuquerque, New Mexico, the United States appearing by and through Assistant United States Attorney Joseph C. Ryan, and further proceedings were had as follows:

MR. LA FOLLETTE: Mr. Espinosa is also of counsel.

[fol. 3] THE COURT: Mr. LaFollette, you do represent these men, do you?

MR. LaFOLLETTE: Yes, Your Honor.

THE COURT: You should have notified the clerk and made your appearance so you could have been here on time this morning.

MR. LaFOLLETTE: I didn't realize you were bringing up arraignment this morning, Your Honor, and I had no notice that they were coming up.

THE COURT: I know, but we didn't know you were the attorney, either.

MR. LaFOLLETTE: That's what I said; I had not formally entered an appearance.

THE COURT: You should let the clerk know you were going to represent them. Then you would have been notified.

MR. LaFOLLETTE: I'm sorry.

THE COURT: Proceed with arraignment.

(The Indictment was read by the Assistant United States Attorney.)

THE COURT: How do they plead, guilty or not guilty?

MR. LaFOLLETTE: We enter a plea of not guilty on behalf of each of the defendants.

THE COURT: Now, you appear with Mr. LaFollette?

MR. ESPINOSA: If Your Honor please, I have been associated with Mr. LaFollette only recently.

[fol. 4] THE COURT: All right. I will have to enter a plea of not guilty, and I will give the trial date later. You will be notified shortly.

That is all.

[Reporter's Certificate (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 19,847 Criminal

UNITED STATES OF AMERICA

—*vs*—

ROBERT M. BRADY AND ALFONSO PEDRO TAFOYA

APPEARANCES:

JOSEPH C. RYAN, Assistant U. S. Attorney, For the Government.

GILBERT ESPINOSA, Esquire, ROBERT H. LAFOLLETTE, Esquire, For Defendant Brady.

DAVID CHAVEZ, For Defendant Tafoya.

BEFORE:

HONORABLE CARL A. HATCH, Judge.

TRANSCRIPT OF PROCEEDINGS, April 30, 1959—of change of plea hearing

* * * *

[fol. 2] MR. RYAN: May it please the Court, the first matter is a possible change of plea, I understand, in the case of the United States of America versus Robert M. Brady and Alfonso Pedro Tafoya.

THE COURT: Let the defendants and their attorneys come forward.

You heard the statement of the District Attorney that this case was being called this morning on the possibility that the defendants desire to withdraw a plea of not guilty heretofore entered and change that plea. Is that correct, gentlemen?

MR. CHAVEZ: May the record disclose, which I think it does, that I appear for the defendant Alfonso Pedro Tafoya only.

THE COURT: You gentlemen appear for the other defendant?

MR. LAFOLLETTE: Yes, your Honor.

MR. ESPINOSA: Yes, your Honor.

MR. CHAVEZ: As far as Alfonso Pedro Tafoya is concerned, your Honor, I have gone over the matter with him fully. He knows the contents of the indictment and I just went over it with him a few minutes ago and he understands and desires to change his plea of not guilty heretofore entered and now enter a plea of guilty.

MR. ESPINOSA: With respect to Mr. Brady, we can repeat what Mr. Chavez said. I believe I know—I have asked him—that he fully understands the situation and he is entering this plea with his full knowledge and consent. That is correct, Mr. Brady?

DEFENDANT BRADY: That's right.

[fol. 3] THE COURT: Before I enter the formal plea of guilty for these defendants, I want to make to them a certain explanation, which I am sure your attorneys have fully advised you of, but which I want to be certain that each defendant understands. In a case of this kind, the indictment charges what could be a capital offense—that is, that the death sentence could be imposed. That sentence can only be imposed, however, where a jury recommends the imposition of the death penalty. On a plea of guilty, such as your attorneys have announced that you desire to enter, the Court alone cannot impose the death penalty. I could impose a sentence anywhere up to life imprisonment. Do you understand that?

DEFENDANT BRADY: Yes, sir.

DEFENDANT TAFOYA: Yes, sir.

THE COURT: Do you understand that no promise has been made to you at all concerning the length of imprisonment that might be imposed by the Court?

DEFENDANT BRADY: Yes, sir.

DEFENDANT TAFOYA: Yes, sir.

THE COURT: Both of you understand that?

DEFENDANT BRADY: Yes, sir.

DEFENDANT TAFOYA: Yes, sir.

THE COURT: And no promises have been made to you by anybody?

DEFENDANT BRADY: No, sir.

DEFENDANT TAFOYA: No, sir, they haven't.

THE COURT: There is some authority, respectable authority, to the effect that on a plea of this kind the

Court might possibly empanel a jury and submit the [fol. 4] question of whether the death penalty should be imposed. That is hardly a practical matter, as I view it now, for this reason: In order for a jury to pass intelligently, if such power exists, I would think a jury would have to be advised and have evidence as to all the facts in the case, not just pass on the plea of guilty entered, because jurors are conscientious. They wouldn't want to say the death penalty should be imposed or should not be imposed unless a full trial was had before a jury. I am not inclined at all to follow that procedure. In what appears to be the present uncertain state of the law, I am inclined to think—and to relieve your minds of any suspense—that the penalty should not be imposed in your case, nor should a jury be empaneled, but you will be sentenced to a sentence that could be for life imprisonment. I want to be sure that you understand that.

Now, with that explanation, do each of you—Brady first—are you guilty or not guilty?

DEFENDANT BRADY: I am guilty, your Honor.

THE COURT: Tafoya, are you guilty or not guilty?

DEFENDANT TAFOYA: I am guilty, your Honor.

THE COURT: Enter a plea of guilty for each defendant.

You will both be back here one week from today at 10:30 in the morning for sentence.

Mr. District Attorney, upon the request of defendant's counsel, not for the purpose of establishing a defense, but to aid the Court in better understanding, the defendant Brady has requested a psychiatric examination by Dr. Brown be made. Will you have that done before next Friday and have a report for me at that time?

MR. RYAN: Yes, your Honor.

[fol. 5] THE COURT: That is all. The prisoners will be remanded to the custody of the marshal until next Friday morning at 10:30.

MR. LAFOLLETTE: Will a copy of that report be available to counsel?

THE COURT: It will be.

I said a week from today. I forgot this was Thursday. Be back Friday morning of next week at 10:30.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA

—vs—

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APPEARANCES:

JOSEPH C. RYAN, Assistant U. S. Attorney, For the Government
GILBERTO ESPINOSA, ESQUIRE, ROBERT LAFOLLETTE, ESQUIRE, For Defendant Brady
DAVID CHAVES, ESQUIRE, For Defendant Tafoya

BEFORE:

HONORABLE CARL A. HATCH, Judge.

TRANSCRIPT OF PROCEEDINGS

May 8, 1959—of sentencing

* * * *

[fol. 2] MR. RYAN: This is the matter of defendants Brady and Tafoya for sentence.

THE COURT: I want to direct my remarks first to the defendant Brady. Having read the presentence report and the statement you made to the probation officer, I want to be certain that you know what you are doing and you did know when you entered a plea of guilty the other day. Do you want to let that plea of guilty stand, or do you want to withdraw it and plead not guilty?

DEFENDANT BRADY: I want to let that plea stand, sir.

THE COURT: You understand that in doing that you are admitting and confessing the truth of the charge contained in the indictment and that you enter a plea of guilty voluntarily, without persuasion, coercion of any kind? Is that right?

DEFENDANT BRADY: Yes, your Honor.

THE COURT: And you do do that?
DEFENDANT BRADY: Yes, I do.
THE COURT: You plead guilty to the charge?
DEFENDANT BRADY: Yes, I do.
THE COURT: To each of you: Upon your pleas of guilty heretofore entered, it is my duty now to pronounce the judgment and sentence of the Court. Do you or either of you or your attorneys have anything you desire to say before sentence is pronounced?

(Mr. Espinosa presented a plea in mitigation on behalf of Defendants Brady and Tafoya.)

THE COURT: Other counsel desire to say anything?

(Mr. LaFollette presented a plea in mitigation on behalf of Defendant Brady.)

[fol. 3] (Mr. Chaves presented a plea in mitigation on behalf of Defendant Tafoya.)

THE COURT: Do either of the defendants desire to say anything?
DEFENDANT BRADY: No, sir.
DEFENDANT TAFOYA: No, your Honor.
THE COURT: The Congress in the wisdom of the law-making body, has imposed for offenses of this kind the severest of all penalties; that is, the death penalty could be inflicted upon a recommendation by a jury. That recommendation is absent this morning. As I said when they were here before, I was not inclined to submit the matter to a jury, but would accept their plea and pronounce sentence, which precludes the imposition of the death sentence. In that they may have been very fortunate. They may have escaped—had they gone to trial, a jury might have recommended the death penalty —I don't know. It would be within the province of the jury, under the facts of this case, to have made such a recommendation, but without the death penalty, the defendants are now subject to the extreme penalty of life imprisonment.

Mr. Espinosa discussed the purposes of criminal law and of punishment. Quite correctly he said the punishment cannot be disregarded; the protection of society is

essential, and the Court always considers the rehabilitation of the defendant. He did not mention that included within the protection of society is a matter which the Court must always consider, and that is the deterring effect of a sentence upon others who might be tempted to commit similar crimes. You are quite right, Mr. Espinosa, in saying that revenge never enters into the passage of sentence. There is never any animosity in the mind of this Court against any defendant, but the Court is charged with the responsibility of imposing [fol. 4] that sentence which, under the facts and circumstances of each particular case, is justified by all the considerations which enter into the passage of sentence and also consideration of the law and its purposes.

It doesn't make too much difference in this case whether a life sentence is imposed or whether a sentence of lesser amount, so long as it is more than 45 years, because even under life imprisonment all hope is not gone for a defendant. A Person who is sentenced to life imprisonment becomes eligible for parole after 15 years. The same is true of any sentence beyond the term of 45 years, so, regardless of the sentence that is imposed, the defendants will not be without hope. They will be eligible for parole under the provisions of law and their own conduct and other matters which the parole board, responsible officials, must take into consideration. No person, so long as there is life, is hopeless, and the death penalty will not be inflicted.

There is some difference between these two defendants. What was said about Tafoya is corroborated in large measure by the information I have received; yet he did participate. He participated in this, these acts. He knew the girl was frightened. He knew that she was going involuntarily, even before they crossed the state line. While he did cooperate and give a statement, nevertheless the difference is so slight, the same sentence shall apply to each defendant.

I will not further hold you in suspense nor lecture you. You have, by your plea of guilty, merited some consideration which you would not have otherwise received, and I am not unmindful of the fact that was stressed

by counsel, of your past records, also of the fact that your plea of guilty has saved this girl—and she is only [fol. 5] a girl—from further terrifying, embarrassing moments. I say "terrifying" because the experience which she underwent must have been most terrifying and even horrible.

It is the judgment and sentence of the Court that the defendants and each of them be imprisoned for the term of 50 years, that they be remanded to the custody of the Attorney General or his authorized representative, and appropriate orders and commitments issue.

That is all.

May I say to counsel, I appreciate your services in this case; all of you have done well. You spoke ably and eloquently.

That is all.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM
—March 13, 1968

Upon motion of Petitioner for a Writ of Habeas Corpus ad Testificandum, it is

ORDERED that the Clerk of this court is hereby directed to issue a Writ of Habeas Corpus ad Testificandum directed to the Warden of the United States Penitentiary at Leavenworth, Kansas, to surrender Robert M. Brady, an inmate of said institution, to the United States Marshal for the District of New Mexico, or his depty, or to the United States Marshal for the District of District of Kansas, or his deputy, in order that the said Robert M. Brady may be brought to Albuquerque in the District of New Mexico to testify as a witness at a hearing in the above-styled cause on the 20th day of March at 1:30 o'clock P.M.; and the said United States Marshal is hereby directed to return the said Robert M. Brady to the custody of the Warden of the United States Penitentiary at Leavenworth, Kansas when his presence is no longer required before this court.

DATED at Albuquerque this 13th day of March 1968.

/s/ H. Vearle Payne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM
—March 13, 1968

Upon motion of Petitioner for a Writ of Habeas Corpus ad Testificandum, it is

ORDERED that the Clerk of this court is hereby directed to issue a Writ of Habeas Corpus ad Testificandum directed to the Warden of the United States Penitentiary, McNeil Island, Washington, to surrender Alfonso Pedro Tafoya, an inmate of said institution, to the United States Marshal for the District of New Mexico, or his depty, or to the United States Marshal for the Western District of Washington, or his deputy, in order that the said Alfonso Pedro Tafoya may be brought to Albuquerque in the District of New Mexico to testify as a witness at a hearing in the above-styled cause on the 20th day of March, 1968 at 1:30 o'clock P.M.; and the said United States Marshal is hereby directed to return the said Alfonso Pedro Tafoya to the custody of the Warden of the United States Penitentiary at McNeil Island, Washington when his presence is no longer required before this court.

DATED at Albuquerque this 13th day of March, 1968.

/s/ H. Vearle Payne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR PRODUCTION OF DOCUMENTS—
Filed March 19, 1968

The Petitioner, ROBERT M. BRADY, by his attorney, hereby moves the Court for an Order requiring the Respondent, UNITED STATES OF AMERICA, to produce, pursuant to Rule 34 of the Federal Rules of Civil Procedure, certain documents for inspection and/or copying, to wit, a pre-sentence report by the United States Probation Office on the Petitioner, Robert M. Brady, in No. 19847 Criminal (D.N.M.) and a psychiatric report on said Petitioner by Dr. Brown in the same Criminal cause number, and would state to the Court that such inspection and/or copying is necessary to a proper presentation of his case.

/s/ Peter J. Adang
Attorney for Petitioner
P. O. Box 2168—1200 Simms Bldg.
Albuquerque, New Mexico

I HEREBY CERTIFY that I have delivered a copy of the foreging pleading to all counsel of record, this 19th day of March, 1968.

/s/ Peter J. Adang
PETER J. ADANG

[fol. 69]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269—Civil

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PRE-TRIAL CONFERENCE

BE IT REMEMBERED that on to-wit, the fourteenth day of December, 1967, at the hour of nine o'clock in the forenoon, the above matter came on for pre-trial conference before the Honorable H. Vearle Payne, United States District Judge.

* * * *

[fol. 78] MR. ADANG: Your Honor, may I ask one question? On the legal issue which is now before the Supreme Court, do you think that we should wait for an opinion to come down or go ahead?

THE COURT: Well, I didn't think that I would. I thought that I'd make up my mind one way or the other on it and of course if it isn't favorable to him and he isn't happy, why, he can appeal. Likewise, if the gov-
[fol. 79] ernment isn't happy, they can take it up like they did the one on the judge in Connecticut, but I—of course, the Supreme Court may come down with an opinion in the meantime that will settle this once and for all.

Okay, I guess that's all, and thank you.

* * * *

[fol. 82] TRIAL

BE IT REMEMBERED that on to-wit, the twentieth day of March, 1968, the above matter came on for hearing before the Honorable H. Vearle Payne, United States District Judge, sitting in open court without jury, at the hour of one thirty o'clock in the afternoon.

The appearances as noted in the caption hereof are again noted.

* * * *

(THEREUPON, the following proceedings were held in chambers.)

THE COURT: All right. You may proceed.

[fol. 83] EMMA BRADY MEDINA

was called as a witness on behalf of the petitioner, and having first been duly sworn testified upon her oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. ADANG:

Q. Will you state your full name for the record, please?
A. Emma Brady Medina.
Q. What is your present address?
A. Nine oh five Princeton Drive, southeast.
Q. Are you related to Robert Brady?
A. I am his mother.

* * * *

[fol. 84] Q. Did you see Robert at any time after he was put in jail?
A. Yes, sir.
Q. On this charge?
A. Yes, sir.
Q. And in your first discussion with him, did you discuss the plea that he would enter?
A. Yes, sir.
Q. And what was his feeling as to what plea he should enter?
A. Not guilty.
Q. And did you concur in that plea?
A. Yes, sir.
Q. Did you have occasion after you discussed this plea with him to change your mind as to what plea he should enter?

A. Yes, sir.

Q. And did you subsequently advise Robert that he [fol. 85] should change his plea?

A. Yes, sir.

Q. And what did you advise him? Will you tell the Court?

A. Well, should I tell about the call I got?

Q. Well, no. Why don't you just tell what you told Robert.

A. Well, I just told him to plead guilty.

* * * *

[fol. 86] Q. (Mr. Adang continuing.) Mrs. Brady did you tell your son anything else—now, I don't want you to repeat anything about a conversation with Mrs. Tafoya, but did you tell him anything else other than that he should plead guilty?

A. Yes, sir. I said, "Plead guilty or they are going to give you the death sentence."

Q. And was that all?

A. Yes, sir. I was not allowed to visit him at the time because it wasn't visiting hours, and I went through the alley of the city jail.

Q. All right. Do you want to rest for a moment?

A. No. I am okay. I went through the alley of the city jail where he was being held and I kept yelling, "Brady. Brady." Then—

[fol. 87] Q. Take your time.

A. Then there was somebody, some fellow up there that yelled, "Is there a Brady here?" So then Brady came to the window. It was upstairs. I don't know how many floors. Brady came to the window and he said, "Mom, what are you doing? You are going to get yourself in trouble," and I just said, "For God's sake, plead guilty. They are going to give you the death sentence."

* * * *

[fol. 90] ROBERT M. BRADY

was called as a witness on his own behalf, and having first been duly sworn testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. ADANG:

Q. Would you state your full name for the record, please?

A. Robert M. Brady.

* * * *

[fol. 91] Q. Are you in the custody of the federal government?

A. Yes, sir, I am.

Q. And what is the reason that you are in custody?

A. I am in custody because I pled guilty to kidnapping.

Q. And when did this occur?

A. In May of 1959.

Q. And what sentence were you given as a result of that guilty plea?

A. I was given a fifty year term.

* * * *

[fol. 95] Q. Now, after the authorities arrested you, Mr. Brady, where did they take you?

A. To the Albuquerque City Jail.

Q. And how long were you in the city jail?

A. Approximately two weeks.

Q. And during this time, where was Alfonso Tafoya?

A. Right there with me.

Q. Did you ever have occasion to discuss the case with him while he was in jail?

A. At all times.

Q. And during this time, this two-week period that you were in the city jail, did you formulate an opinion in your own mind as to what plea you would enter?

A. I did, and we both entered a plea of not guilty.

[fol. 96] Q. Then it was your decision at that time that you were going to plead not guilty?

A. That was my decision.

Q. Mr. Brady, did you know during this period of two weeks that you were in the city jail whether or not Alfonso Tafoya had made any confession or given any statement to the authorities?

A. At this time, I had no knowledge of Alfonso Tafoya giving a statement to the authorities.

Q. Did you give any statement to the authorities?

A. I never gave a statement to the authorities.

Q. Did you ever subsequently learn that Alfonso Tafoya had given a statement to the authorities?

A. Several months later.

Q. During this two-week period again that you were in city jail, did you have occasion to consult with your attorney?

A. He came up once to the best of my knowledge.

Q. Was this Mr. LaFolette?

A. Yes, it was.

Q. Was any other attorney present?

A. I'm not sure whether Mr. Espinosa was with him. I know I saw Mr. LaFolette and Mr. Espinosa at the time of the arraignment when we pled not guilty.

Q. I'm talking about the time you were in city jail [fol. 97] during the first two weeks.

A. I am not positive.

Q. Were any other persons other that yourself and Mr. LaFolette present to your knowledge?

A. Alfonso Tafoya.

Q. Did Mr. LaFolette discuss the case with both of you?

A. He did.

Q. Did you discuss at that time what plea you would enter to the charge?

A. We did.

Q. And what did you tell Mr. LaFolette at that time?

A. That we were not guilty, and that we would enter a plea of not guilty.

* * * *

[fol. 98] Q. What plea did you enter at that arraignment?

A. We entered a plea of not guilty.

Q. Did you advise your attorney before this arraignment that you were going to plead not guilty?

A. We did.

Q. To your recollection and knowledge, did he concur in this plea?

A. Yes, he did.

Q. What happened after the first two weeks that you were in city jail?

A. We were transferred to the Santa Fe County Jail and held there.

Q. When you say "we were transferred" who do you mean?

A. Alfonso Tafoya and myself were transferred to the Santa Fe County Jail.

Q. How long were you in the Santa Fe County Jail?

A. Approximately two weeks.

Q. And during this period, you were in Santa Fe County Jail for two months with Alfonso Tafoya, did you have occasion to discuss the case with him?

[fol. 99] A. Continuously at all times.

Q. And during this period you were in the Santa Fe County Jail, did you ever change your mind as to what plea you would enter?

A. No, I didn't.

Q. Did you still want to enter a plea of not guilty?

A. Definitely.

Q. Did Alfonso Tafoya during this period indicate to you that he might want to change his plea?

A. No, he didn't.

Q. Now, during this period you were in the Santa Fe County Jail, did you ever have an opportunity to consult with counsel?

A. Yes. Both of us at all times. Both of us—we both consulted with our counsel.

Q. Well, how many times during this period of time you were in the Santa Fe County Jail?

A. Once or twice. May I make a statement at this time?

* * * *

Q. Who was present at these meetings when you consulted with your counsel?

[fol. 100] A. Alfonso Tafoya, myself, and Mr. LaFolette and Mr. Espinosa.

Q. All of you were together?

A. Yes, sir.
Q. At these meetings?
A. Right.
Q. How many meetings were there, do you know?
A. One, possibly two.
Q. And what was discussed at these meetings?
A. The information that Alfonso Tafoya and I presented to the attorneys so they could investigate with a determination towards helping us prove our innocence.
Q. During this period of time that you were in the Santa Fe County Jail, did you learn that Alfonso Tafoya might have given a statement or confession to the authorities?
A. No, I did not.
Q. What was your feeling during this period as far as your plea? Were you going to—
A. I was going to plead not guilty and I thought I would be found not guilty.
Q. Did your attorneys at any time during this period or on the occasion of these two meetings advise you that you should change your plea?
A. Not at this time.

* * * *

[fol. 101] Q. Now, while you were in the city jail on this second occasion after you came down from Santa [fol. 102] Fe County, did you consult with your attorney at all?
A. I believe so. For about one time, I believe he came up to see me.
Q. And who came?
A. I believe both Mr. LaFolette and Mr. Espinosa. Possibly just Mr. LaFolette himself. I believe Mr. Espinosa was there also.
Q. What did you discuss at that time?
A. Trying to find out information that I had given them, if they were investigating to determine—to find witnesses to prove my innocence.
Q. At that time, did you give any information to Mr. LaFolette that you wanted to change your plea?
A. No, I didn't.

Q. Did he give any indication to you that he wanted you to change your plea?

A. Not at this time.

Q. And to the best of your knowledge, then, at this time he still concurred in your plea of not guilty?

A. Yes, he did.

* * * *

Q. Were there any other meetings between you and counsel after this meeting with Mr. LaFolette?

[fol. 103] A. Yes. Approximately about—I would believe around the thirtieth of April, we were taken to the federal building and we were taken to a little conference room where Judge Chavez and both counsel and myself and Tafoya were placed in this room for discussion.

Q. Now, when you say "we", who do you mean?

A. I was taken from the Albuquerque City Jail and Alfonso Tafoya was taken from the Santa Fe County Jail.

Q. Again, who was present?

A. Judge Chavez, Mr. Espinosa, and Mr. LaFolette.

Q. Now, can you tell us what the discussion was at that meeting?

A. At that meeting, I was under the impression that we were going to start discussing the manner in which we were going to present our case to the Court. What transpired was a little different.

When I got to the meeting, I thought this was going to happen and I was shown a statement that Alfonso Tafoya gave to the authorities, and from this moment on, every effort was made to induce me to plead guilty.

* * * *

[fol. 104] Q. At this time, were you thinking that you should still go ahead with your plea of not guilty?

A. Yes, I did.

Q. Did your—did any of the attorneys present at that meeting indicate that you should change your plea prior to the time they handed you the statement?

A. No. No one did.

Q. Nothing then was said to discourage your plea?

A. Not until after the statement was handed to me.

Q. All right. Who handed you the statement?

A. I would think that Mr. Espinosa handed me the statement. I believe, to the best of my ability, Mr. Espinosa.

Q. When he handed you the statement, did he say anything to you?

A. Yes, he did. He said, "How do you expect to fight this case with this statement that is going to be used against you?"

Q. Are those his exact words to the best of your recollection?

A. To the best of my recollection.

Q. What did you do then?

[fol. 105] A. I read the statement and I felt pretty bad about it.

Q. What do you mean you felt bad about it?

A. Well, I felt bad about what was said in the statement because the statement was not accurate. The statement was a lie.

Q. Did the statement tend to incriminate you?

A. Definitely.

Q. Did you have at that time any feeling with regard to the plea that you would enter after you had read the statement?

A. Well, after I was spoken to, yes. After I was told that there was no defense, that all I could do was plead guilty, then I had no choice but to plead guilty.

* * * *

[fol. 106] Q. Was any mention made of the death penalty if you continued to persist in your plea of not guilty?

A. Yes, there was.

Q. What was said and who said it?

A. Mr. LaFolette, I believe, was the one that said it. That if I went to trial and took—jury trial, that there was a great possibility at this time that I would be given the death sentence.

Q. Did that influence your decision in any way?

A. Very much so.

Q. Well, how did it influence you?

A. Well, up to this period of time, I thought that Alfonso Tafoya and I were both pleading not guilty. At this time, I thought, well, if Alfonso Tafoya and I both pled not guilty and he testified on this, I thought I had a chance, but due to the fact when I seen he was going to plead guilty—at this time, also, Alfonso stated to me [fol. 107] that he would testify for me. But, it just seemed very difficult for me to believe that any jury would believe Alfonso Tafoya testifying to me that I was not guilty when he in fact had pled guilty to this crime. So, I just couldn't grasp the situation quite right, you know.

* * * *

[fol. 108] Q. Did you at that meeting then decide to change your plea to guilty?

A. Yes, I did.

Q. And would you tell the Court what motivated that decision?

A. My attorneys, statements by Alfonso Tafoya, the great risk of a death sentence.

* * * *

Q. Did you then make the decision that you would plead guilty?

A. Yes, I did.

Q. At that time, did you believe you were guilty?

A. No, I didn't.

* * * *

[fol. 114] Q. (Mr. Adang continuing.) Mr. Brady, between the time you actually pled guilty and—well, strike that.

At the time that you came before the court for sentencing, did the court at that time inquire into the voluntariness of your plea of guilty?

A. Yes, the judge did.

* * * *

[fol. 115] Q. (Mr. Adang continuing.) After the court made this inquiry of you, Mr. Brady, did you change your plea again?

A. No, I didn't. I reluctantly let my plea of guilty stand.

Q. Will you tell the Court why you did that? Well, let me ask you this question: Did the court make an inquiry of you concerning whether there were any understandings or agreements in return for your plea of guilty?

A. Yes, the court did.

Q. And what was your reply to that?

A. That there was no agreement.

Q. Why did you make that reply?

A. Because at the time we were in this conference room, I was told that my guilty plea would not be accepted if I ever said that any agreements were made before I entered my guilty plea.

• • • •

[fol. 116] Q. Are you still serving the same fifty-year sentence, Mr. Brady?

A. I am still serving time, but not the same fifty years. My sentence has been reduced to thirty years.

• • • •

Q. (Mr. Adang continuing.) Mr. Brady, at any time [fol. 117] during the course of these events in 1959, did you believe you were guilty?

A. Never.

Q. Do you believe now that you are guilty?

A. I'm not guilty. Not even now.

Q. This motion to vacate sentence has been brought approximately nine years after your plea of guilty. Is this the first time you have raised this question?

A. No, I have sent in many motions to the court but this is the first time that a motion has been entertained in this Court.

• • • •

CROSS EXAMINATION

BY MR. McCARTY:

* * * *

[fol. 118] Q. You say that you talked to your co-defendant Tafoya many times in Albuquerque and Santa Fe jail about the facts of this case?

A. Yes, I did.

Q. Did he ever tell you when he first gave a written confession concerning this case?

A. Never.

Q. Do you know whether or not he had given that confession immediately upon being arrested?

A. No, I did not.

Q. Do you know when he gave the confession?

A. I do now.

Q. And when was that?

A. Immediately after arrest.

Q. And you are saying that for a month in Albuquerque, is that how long you stayed in Albuquerque jail before you went to Santa Fe?

A. For approximately two and a half months I didn't know.

Q. And for a month in Albuquerque, you were with the defendant Tafoya?

A. Two weeks, approximately.

[fol. 119] Q. And then up in Santa Fe?

A. For about two months.

Q. And you talked about this constantly?

A. Yes.

Q. And he never mentioned this?

A. Right.

Q. And the first time you saw that statement—

A. Was when I was taken into this conference room.

Q. Gilbert Espinosa handed it to you?

A. Right.

Q. When was the first time that you knew that your co-defendant Tafoya was going to enter a plea of guilty?

A. When my mother came and hollered up through the window of the Albuquerque City Jail and told me to

enter a plea of guitly, that Alfonso Tafoya was entering a plea of guilty.

Q. And when was this in relation to this little conference on the twenty-first of April that you talked about?

A. Probably a week before or ten days.

Q. But that's all that your mother told you?

A. No. At this time she told me, "Please, son, enter a plea of guilty because they are going to burn you."

Q. Well, you were aware, weren't you, that this was a capital offense?

[fol. 120] A. I was.

Q. When did you first become aware of that?

A. Every time I read a newspaper.

Q. Well, shortly after your arrest in January?

A. Right.

Q. So, you knew that it was a capital offense?

A. Yes, I did.

* * * *

[fol. 121] Q. You didn't know who they were talking [fol. 122] to, trips they made, investigation that they performed?

A. Oh, I know of an investigation. I know of a witness that he went to talk to that I had told him to see which he subsequently said, "Well, that witness won't be any good because he is an exconvict," which I didn't know that the man was an exconvict when I told him.

* * * *

Q. When was the first time there was ever any discussion about your entering a plea of guilty in this case?

A. On the twenty-first in this room, in the conference room in the Federal Building.

Q. But you had known before that that Tafoya was going to enter a guilty plea?

A. A few days before.

Q. You were aware, were you not, that Tafoya could testify in your trial?

A. Yes, I believe I was afterwards. I was aware.

Q. You were aware of that on the twenty-first of April, were you not?

A. Right.

[fol. 123] Q. You were aware of that before because you say that he had told you he would testify on your trial?

A. On the twenty-first of April in this room when I read this statement. I was standing there reading this statement and Tafoya denied making this statement to me.

* * * *

[fol. 127] Q. Yes, and before that, you had been absolutely certain of your innocence and had intended to go to trial and plead not guilty?

A. Yes, I did.

Q. Because you were innocent?

A. Yes, I was, and I am.

Q. And this conversation lasted how long?

A. Forty-five minutes, half hour.

Q. And you knew that you could get up to life, that that's what the statute provided?

A. No, not at this time I didn't know that.

Q. When did you first learn that?

A. When Judge Hatch told me.

Q. What did you think you could get when you were having this conversation, the maximum?

A. Death.

Q. That was the maximum?

A. Yes.

* * * *

[fol. 128] Q. Before the conversation, what did you think you could get, maximum time?

A. Well, before the conversation, I never even thought of time because I thought I would be found innocent. I didn't even think in these terms of time.

Q. You said you read the newspaper and you were aware it was a capital offense?

A. Right, death sentence. But, I never even thought of term of years. I thought of innocent if I pled not guilty and a term of years if I pled guilty.

* * * *

[fol. 129] ALFONSO PEDRO TAFOYA

was called as a witness on behalf of the petitioner and [fol. 130] having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. ADANG:

Q. Will you state your full name for the record, please?
A. My name is Alfonso Pedro Tafoya.

* * * *

[fol. 135] Q. I'm talking about—I believe you indicated that you made the statement right after you were arrested, is that correct?
A. Right.
Q. And then you were put in city jail?
A. Right.
Q. And then did you see Robert Brady in the city jail?
[fol. 136] A. He was brought in afterwards, like I said.
Q. Did you discuss your case with him?
A. That night, yes. That night, yes.
Q. And what about the case did you discuss?
A. About?
Q. How you were going to plea?
A. First I told him that—what had happened. Then I told him what I did, then I told him that we have nothing to worry about. I says, "They charged us with something we don't do. We are going to plead guilty to this thing that they are going to charge us with." I mean innocent. "That we are going to plead to innocent on this charge."
Q. In other words, you were going to plead not guilty?
A. Not guilty.
Q. Did Robert Brady indicate to you what he was going to plead?
A. We were both going to plead the same thing.
Q. On how many occasions—now, while you were in the city jail, how many occasions did you discuss the case with Robert Brady?

A. On how many occasions?
Q. Yes.
A. I can't recall how many, but I know that we dis-
[fol. 137] cussed it.
Q. Was it more than once?
A. I don't remember.
Q. Were you taken anywhere then from the city jail?
A. Yes. We were taken to Santa Fe.
Q. Santa Fe County Jail?
A. Yes.
Q. Did Robert Brady go to the Santa Fe County Jail?
A. Yes. We both went to the Santa Fe County Jail?
Q. While you were up in the Santa Fe County Jail, did you have an opportunity to discuss the case with him?
A. Yes, we were together.
Q. And at that time, what did you discuss?
A. About, you know, we are going to plead not guilty and so on. I mean really it wasn't too much to discuss, only that we are going to plead not guilty and get our lawyers to help us on our case.
Q. While you were in the Santa Fe County Jail, you believed you were not guilty?
A. Yes. I still believe I am not guilty.
Q. And did Robert Brady indicate to you what he felt?
A. Yes.
Q. What was his feeling?
A. That we weren't guilty.

* * * *

[fol. 138] Q. But, you do recall talking to a lawyer when you were in the Santa Fe County Jail?
A. Yes.
Q. What lawyer did you talk to at that time?
A. I talked to Dave Chavez, my uncle.
Q. Was Gilberto Espinosa there at that time?
A. At that time, I don't remember.
Q. Do you recall if anyone else besides yourself and Judge Chavez were present at that meeting?
A. I don't remember.

Q. Now, at that time, what did you tell Judge Chavez about the case with respect to the plea you wanted to enter?

A. Well, the first thing, he told me who he was. I didn't know him, and he told me who he was and that [fol. 139] my dad had hired him to represent me and that is when first I heard the name of Mr.—what's his name, the other lawyer I am supposed to have? Espinosa. He told me that he was going to represent me, that Mr. Espinosa was going to gather evidence for my case and not to worry. He told me—he says that he would help me, you know, in the case.

Q. Did you tell him at that time what plea you wanted to enter?

A. Yes.

Q. What was that?

A. Not guilty.

Q. Did he advise you against that?

A. Then?

Q. Yes.

A. No, not the very first time that I seen him.

Q. Did you thereafter decide that you wanted to change your plea to guilty?

A. That same day, you mean?

Q. No. At any time thereafter.

A. No. I never changed my mind to change my plea. No.

Q. Well, did you ultimately decide you wanted to plead guilty?

A. No. I never decided to plead guilty.

Q. You didn't?

[fol. 140] A. No.

Q. Well, how did it come about that you did enter a plea of guilty?

A. Well, they told me to plead guilty. Dave Chavez told me to plead guilty.

Q. When did he tell you this?

A. There in Santa Fe on one of the visits.

Q. All right. What did he say to you at that time?

A. He said that the case looked bad and—

* * * *

[fol. 141] Q. (Mr. Adang continuing.) After this meeting with Judge Chavez, did you ever talk with Robert Brady?

A. Yes.

Q. Did you discuss this meeting with Robert Brady?

A. Yes.

Q. And what did you tell Robert Brady at that time?

A. I told him that they had told me that they were going to plead me guilty, for me to plead guilty, told me to plead guilty. Anyway, they were talking about the death sentence; that he told me that I would get the death sentence if I was found guilty; that there was no alternative; and that if I pleaded guilty, that he wanted me to plead guilty so I could get—he said I would get five or seven years.

Q. And who said this to you?

A. Dave Chavez.

Q. And you told this to Robert Brady?

A. Yes, because he told me that he couldn't get—that he probably wouldn't get the same thing. He told [fol. 142] me that Robert Brady was the agitator in the thing. What he meant, I don't know. But, Brady would get twice what I got, and that I would get five to seven years, so I figured Brady would get ten to fifteen.

Q. And you inforemd Robert Brady of this?

A. Yes. They told me that that's what we would get.

* * * *

[fol. 143] Q. At any time prior to this meeting, do [fol. 144] you recall Robert Brady ever telling you that he wanted to change his plea to guilty?

A. Yes. Brady always wanted to change his plea to guilty.

Q. You mean he always wanted to plead guilty?

A. Innocent. I'm sorry.

Q. You mean prior to this meeting, he always wanted to plead not guilty.

A. He wanted to plead not guilty, yes. Innocent is what I am thinking of.

Q. To the best of your recollection, when did he first say that he wanted to plead guilty?

A. Brady?

Q. Yes.

A. Brady always wanted to plead innocent until they told us what the—Judge Chavez told me that I would get this time and he would get twice as much as I would get, five, ten, or fifteen, and he always wanted to plead not guilty.

Q. Was it at that meeting that he then said he would plead guilty?

A. Yes.

Q. Did he say he would plead guilty?

A. I think.

* * * *

[fol. 146] Q. During this period of time before you pled guilty, whenever you were with your attorneys, was the death penalty discussed?

A. Ask that again?

Q. Well, when you were with your attorneys conferring with them prior to the time you pled guilty, did your attorneys ever discuss with you the possibility that you could get a death sentence?

A. They didn't discuss the possibility. They told me I would get the death sentence if I pled not guilty and was found guilty; that I would get the death sentence, and that scared me.

Q. And did this fact influence your decision to go ahead and plead guilty?

A. Well, at first, no. I figured, "Well, I'm going to get big time anyway, probably." I figured, you know, since they were going to take my life if they found me guilty, so I asked him and he says, "No, you will get from five or seven years," and that looked better to me than the death penalty.

* * * *

[fol. 147] CROSS EXAMINATION

BY MR. McCARTY:

* * * *

Q. You did give a confession to the F. B. I. shortly after you were arrested, did you not?

A. Yes, I did.

Q. Did you ever tell your co-defendant about that?

[fol. 148] A. Yes. Yes, I did.

Q. When did you tell him about that?

A. After they brought him—after he come—I don't know where, but I never did see him until after this. I was in a cell when they brought him in and I told him that I did not write no confession. I told them what I had done that night that they were asking me about.

Q. And you signed that confession, did you not?

A. I couldn't read it, no. So, they asked me to sign it and I barely did sign it. I couldn't write it myself because I was—I guess I was an alcoholic. I couldn't even hold the pencil steady in my hand enough to write so they said they would type it, but I told them to put down what I was telling them.

Q. And you told your co-defendant that you had given this confession?

A. Yes. Yes, I did.

Q. When was it that you decided to enter a guilty plea?

A. When was it that I decided to enter a guilty plea? When Judge Chavez went to Santa Fe to see me. Not the first time. You are talking about the guilty plea, right?

Q. That is the question.

A. You see, I forget. I still got that—because I have been away so long, I forget. He told me that for me to [fol. 149] plead guilty. He told me to plead guilty for reasons. Then he told me the reason. He told me that he didn't think we had a chance; that I was going to get the death penalty because my co-defendant or Robert Brady, whatever you want to call him, had no chance of beating the case, and that it was a big bad thing that he had done—we had done, whatever you want to call it, you know, but I don't remember exactly if he said "we" or "him". But, since we are both in it, so it is "we". And that my part in it was—that they could tell that he was the agitator. In other words, that he was the ony that did the whole thing and that he would get found guilty and he would get the death penalty and

since him getting the death penalty, that they had no other choice but to give me the death penalty, and this, of course, scared me.

* * * *

[fol. 156] GILBERTO ESPINOSA

was called as a witness on behalf of the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

[fol. 157] DIRECT EXAMINATION

BY MR. McCARTY:

Q. Would you state your name and your profession, sir?

A. Gilberto Espinosa. I am an attorney.

Q. How long have you been an attorney?

A. I was admitted to the bar in 1921.

Q. Have you practiced in the State of New Mexico since that time?

A. I have.

Q. Have you ever held any public office, Mr. Espinosa?

A. I served as Assistant United States Attorney for approximately fourteen years in this district.

Q. Have you have any experience other than that in trial of criminal cases, sir?

A. I have been in the active practice—at that time, assistants did not have to devote his entire time, and I had considerable practice in district court and in other courts.

Q. Have you ever in 1959, had you ever defended a capital case?

A. Prior to 1959, I was associated with Senator Chavez in—oh, I would say four cases. I represented a capital case in the supreme court on appeal. I was called [fol. 158] in after the defendant had been convicted and I was retained by colored people throughout the state, and I represented the defendant in that case on appeal.

Q. And you have had other criminal cases that you had defended at that time?

A. Hundreds.

Q. And prosecuted quite a few, I imagine.

A. Well, I don't know. I expect I appeared before a jury a thousand times in the fourteen years I was in the United States Attorney's office.

* * * *

[fol. 159] Q. What plea was entered to the best of your recollection, first, in the criminal case?

A. When we talked to them at Santa Fe, Mr. Brady was unwilling—he was asserting his innocence. I understand that at the hearing before Judge Mowry, which I was not present, both entered appearance of not guilty. I am sure of this because afterwards, I contacted several [fol. 160] of the relatives of Tafoya in an effort to try to obtain bond for him. The only time I recollect that I saw them together was at the time they were before Judge Hatch.

Now, I may have talked to them at the jail here in Albuquerque. I would not say that I did not.

* * * *

Q. About a week before they entered their change of plea from not guilty to guilty, did you meet—you and the five people I have just named, meet in the Federal Building and discuss privately among yourself the possible outcome of a guilty plea?

A. Yes. To this extent: When we were in the Federal Building, Mr. LaFolette and I were the only ones that had any conversation where Brady was present.

* * * *

Q. What was the nature of that conversation?

A. Most of the conversation was had between Mr. LaFolette and Brady. At that time, as I understood, Tafoya had informed Chavez that he was ready to change [fol. 161] his plea; that he was going to enter a plea of guilty. The conversation that was had with Brady and Tafoya when I and LaFolette were present at the Federal Building was concerning the plea that Brady would enter. Tafoya had agreed to—or I won't say agreed. He had made up his mind and informed us that he was ready to plead guilty.

Q. In talking to Mr. Brady, did you make any representations to him that he would get any special treatment, or that he would receive anything if he would enter a guilty plea?

A. I certainly did not.

Q. Did you represent to him that he would get a certain term of years?

A. I did not. He was informed as to the sentence that the statute provided, and so far as I was concerned and Mr. LaFolette also, he was informed that that was a matter entirely for the court.

Q. Did you have any discussion with him about the possibility of someone later seeking executive clemency after he had been sentenced?

A. I did not.

Q. You did not?

A. I did not.

* * * *

[fol. 162] CROSS EXAMINATION

BY MR. ADANG:

* * * *

Q. Now, were you at any of the conversations between Mr. LaFolette and Robert Brady? Were you present?

A. The conversation we had at the jail in Santa Fe and at the Federal Building here.

Q. All right. At the time you were at the jail in Santa Fe, do you recall then what was discussed?

[fol. 163] A. Mr. LaFolette had personally gone to El Paso and made a complete investigation of Mr.—and Mr. LaFolette informed both of them as to the results of his investigation.

Q. You say Mr. LaFolette informed both of them. Was Tafoya present at that time?

A. I believe he was. I wouldn't be certain. They were both together, I believe.

* * * *

[fol. 164] Q. Now, in this conversation that you had in the Santa Fe County Jail in the presence of Mr. LaFolette and Mr. Tafoya and Mr. Brady, did Mr. Brady indicate to you what he wanted to plead at that time?

A. He did not indicate to me. He indicated that he was—Mr. LaFolette was principally talking to him. I was there and I gave my opinion and advice when it was opportune, and they asked for it. He did indicate that he did not want to plead guilty.

Q. Did Mr. Tafoya say anything with respect to his plea at that time?

A. He had made up his mind to plead guilty.

Q. Did Mr. Tafoya make up his mind to plead guilty in your presence?

A. No.

Q. And who was he with at the time he made up his mind?

A. My understanding was that he had communicated that information to Judge Chavez. When we were at the Federal Building, he reaffirmed that intention and I was present.

Q. Well, this inforamtion that he had decided to plead guilty was not communicated directly by him but by someone else, is that correct?

A. It was communicated by him to Judge Chavez.

* * * *

[fol. 165] Q. Did you ever try to obtain bond for Brady?

A. No. As a matter of fact, my principal participation in behalf of Brady came when we were before Judge Hatch after he had entered a plea, and in my plea to Judge Hatch, I interceded for both.

Q Would that be at the time of sentencing or at the time of the plea?

A. After the plead had been entered and after—I don't think he was sentenced immediately. I don't remember. I think they—maybe the next day or I don't recall.

Q. You say at that time you made a plea to the court on behalf of both?

A. Yes. Yes, sir.

* * * *

[fol. 166] Q. I believe you indicated to Mr. McCarty that you were present at a meeting in the Federal Building at which Judge Chavez, Mr. LaFolette, and Mr. Brady, and Mr. Tafoya, were all present?

A. Yes. We were all there.

Q. Can you tell us what was discussed at that meeting?

A. They had made their determination to enter a plea of guilty, and we generally discussed the situation. There was no assurance made by anyone as to what the sentence would be.

Q. Well, when that meeting first started, Mr. Espinosa, wasn't Mr. Brady still persisting in his plea of not guilty?

A. Not to my recollection.

Q. Well, can you tell me when he first decided he was going to plead guilty?

A. Sometime prior to the time we appeared before Judge Hatch.

* * * *

[fol. 167] Q. Well, let me ask you this, Mr. Espinosa: Isn't it true that Mr. Brady originally pleaded not guilty?

A. That is my understanding. I was not present.

Q. Then, as I understand it, the second time he appeared before the court was when he changed his plea to guilty, is that correct?

A. That is my recollection.

* * * *

[fol. 168] Q. Yes, sir. But, I asked you how long was this meeting that took place before the time you appeared in court?

A. You say how long it was before the meeting. It was the same meeting. I don't think it lasted more than fifteen or twenty minutes.

Q. Yes, and then how long was it then before you went into court and he changed his plea?

[fol. 169] A. Right away.

Q. Was that the same day?

A. Yes.

Q. And it is your recollection that he had already made up his mind when he went into that meeting to change his plea to guilty?

A. Yes, sir.

Q. Do you know when he changed his plea to guilty or when he decided to change his plea to guilty?

A. I can't say. This was eight years ago and at that time, why, I kept no particular notes. But, I am certain that when he appeared before Judge Hatch and all of us were there, his mind was made up and he entered his plea, and there was no coercion on the part of anyone to influence that plea.

Q. Was there ever any representation made by you, Mr. Espinosa, that if Robert Brady pled guilty, the Chavez family would work to get him a reduced sentence?

A. There certainly was not.

Q. Did you ever make any specific representation to him as to the length of time he would spend in jail if he pled guilty?

A. No, sir, I did not.

Q. Did you at any time discuss with Mr. Brady the possibility of the death penalty if he continued to plead [fol. 170] not guilty?

A. That was discussed, yes.

Q. And can you recall what you said to him in regard to that?

A. No, I cannot recall except that the law and the consequences were explained to both of them.

Q. Did you ever tell him that he would definitely get the death penalty if he pled not guilty and went before a jury?

A. No.

Q. Mr. Espinosa, did you ever specifically represent to Mr. Brady that—well, let me retract that and establish a foundation for it.

Did you know that Mr. Tafoya had made a confession to the authorities?

A. Yes, sir.

Q. When did you first become aware of that?

A. Almost as soon as I was employed in the case.
Q. Did you ever inform Mr. Brady of that?
A. I think he was told about it. I think he knew about it.

* * * *

[fol. 171] Q. Did you ever inform Mr. Brady of the possibility that he could continue to plead not guilty and waive a jury trial?
A. My recollection is that—
MR. McCARTY: Excuse me, Mr. Espinosa. I want to object to the form of that question. The federal rules do not permit a waiver of jury trial on the instance of the defendant only.
THE COURT: Well—
MR. ADANG: I understand. That is why—
THE COURT: I am not ruling on that, but I am going to let him state what may have been said.
A. I will answer that question. In the discussions that we had, the record will—the correspondence and everything else will show that I definitely was of the opinion that Judge Hatch would not try that case upon a plea of not guilty; that he would not try the case without a jury.
Q. (Mr. Adang continuing.) Did you ever discuss that with Judge Hatch?
A. No.
[fol. 172] Q. It was merely your opinion, then, is that correct?
A. It was my opinion and I think I was right.

* * * *

ROBERT H. LA FOLETTE

was called as a witness on behalf of the respondent, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. McCARTY:

Q. Would you state your name, sir?

[fol. 173] A. Robert H. LaFoette.

Q. And what is your profesion, sir?

A. Attorney at law.

Q. And when did you first bgin the practice of law?

A. Nineteen twenty-five.

Q. Where was that, sir?

A. Here in Albuquerque.

Q. Have you practiced law from that time until 1959?

A. Yes.

Q. In 1959—

A. No. In 1968, I retired.

Q. In 1959, however, you were practicing law?

A. Yes.

Q. And did you at that time represent Mr. Robert Brady in a criminal case in the United States District Court?

A. Yes, I did.

Q. By whom were you retained?

A. I represented Robert in a divorce case the year before and had represented his mother on numerous matters and she called me the night he had been arrested, and asked if I would run to the jail as fast as possible, because he had been held on a federal charge of kidnapping. I went down to the jail and talked to him. He [fol. 174] asked me to go ahead with the case. I did.

You might say I came back to my office and the Tafoya family, Mr. Tafoya, the family of young Tafoya in this case, was there, and wanted to employ me. I told him that I had just learned from Robert Brady that Mr. Tafoya had given a very damaging statement to the F. B. I., and, therefore, that I ffelt there would be a conflict and I couldn't take their case and I urged them to get Mr. Espinosa.

* * * *

Q. Mr. LaFolette, did you ppractice any criminal law prior to 1960?

A. I practiced thirty years oof it.

Q. And during that time, ddid you represent ever a defendant in a capital case?

A. Yes. I had represented mmany criminals.

Q. And did you represent other people?
[fol. 175] A. In capital cases, I had represented many defendants.

Q. Did you represent other people in felony cases?

A. Oh, I had represented hundreds of cases, and I can gladly enumerate some of them if the Court would like further—

THE COURT: I don't think that will be necessary.

Q. (Mr. McCarty continuing.) That won't be necessary. You won some and lost some, I imagine.

A. Won some and lost some. But, I might say I never had one where the defendants had tied themselves up in a sack like they had in this one.

MR. ADANG: I'm going to object to that answer, Your Honor.

THE COURT: Yes. That will be stricken.

Q. (Mr. McCarty continuing.) Did you conduct any investigation in the case involving Mr. Brady?

A. I certainly did.

Q. Did you interview Mr. Brady about the case?

A. Several times. I interviewed Mr. Brady and I went down to El Paso at his suggestion to interview various witnesses.

Q. Who did you interview in El Paso?
[fol. 176] A. I interviewed a couple of barbers that he had talked to during the time he was in Juarez.

Q. Had he given you their names as possible witnesses?

A. Yes. And I interviewed some in El Paso where they had been in the neighborhood selling the car.

Q. Who was conducting the other investigation? Did you conduct any other investigation?

A. I did. I did a great deal of briefing involving the question of the Tafoya confession.

Q. Did you discuss the matter with anyone in the United States Attorney's office?

A. I certainly did, and they were very free in showing us statements of prospective witnesses.

Q. They went beyond the discovery rules?

A. Yes.

Q. And gave you more information than they were required to?

A. They certainly did. They showed us the statements of various witnesses that would be very damaging.

Q. They opened their file to you?

A. Opened their file more or less.

Q. Did you ever have any discussion after you had conducted your investigation? Did you have any discussion with Brady about the merits of his case?

[fol. 177] A. Yes. On two occasions, I discussed the seriousness of certain testimony and asked him one time before he learned that Tafoya was pleading guilty, I asked him if he still wanted a jury trial and he said, "Yes," he did.

Q. Did you discuss with him—

A. And I certainly never did try to prevail on him not to have a jury trial as long as he said he wanted one.

Q. Did you discuss with him after you learned that Tafoya was going to plead guilty, did you discuss with him—

A. Yes.

Q. —the merits of the case?

A. I did. But I didn't have to discuss very much because as I walked up to him and began to explain what I had learned about Tafoya, and I said, "Under all the circumstance, I believe you should plead guilty," and he said, "Yes." He said, "I have changed my mind. I want to plead guilty."

Q. Your judgment in this matter is based on your experience as a lawyer and the facts—

A. Yes.

Q. —of the case?

A. I could definitely say we could not go before a [fol. 178] jury with this case.

Q. Did you ever discuss with Mr. Brady what his sentence might be?

A. What his sentence might be?

Q. If he would plead guilty.

A. Yes. We told him that under the statute, where they had any way injured the party allegedly kidnapped,

that they would be subject to the death penalty, and I really didn't have to tell him that because Judge Hatch reminded us of it on at least three occasions, and it was written in the press where the death penalty was discussed, and the death penalty would apply in any case where there was injury to the person. Of course, with an allied charge of rape, that is certainly the most serious injury that I can think of.

Q. Did you discuss with him the possible consequences of a sentencing on a plea of guilty?

A. Yes. We told him that under the Parole Law, that we made an investigation and gave him the best we could, that we believed he would have to serve about twelve or fifteen years. I can't say for sure. It's been eight years ago. But, I know that we gave him definite information that he would have a long sentence to serve, but we didn't expect a fifty-year sentence.

Q. When you told him that he might serve twelve or fifteen years, did you tell him that this would be his [fol. 179] sentence or did you tell him that this was your judgment of what the sentence might be?

A. I just told him what the maximum under the statute might be and we would try to get mercy.

Q. And what did you tell him about the maximum?

A. We made a very strong plea for mercy, but didn't get any.

Q. What did you tell Mr. Brady the maximum sentence was?

A. Well, I believe it was fifty years. That's my best recollection. If he didn't, if he pled guilty, because I didn't take any part in the Tafoya operation by which he changed his plea. I only learned that from Mr. Espinosa verbally and through a letter from Judge Chavez, and I naturally had told him he could get the death penalty, and so I felt very gratified when he decided to change his plea in that we saved him from a death penalty in my opinion.

* * * *

[fol. 180] Q. Yes. Did you make any representation, any statement to Mr. Brady concerning what might occur after he was sentenced?

A. In the matter of pardons and things of that kind?

Q. Yes, sir.

A. No. After the boys came from the courtroom with a fifty-year sentence, I asked Mr. Espinosa and Justice Chavez if they would hold a conference with the boys and we did. We got a room allowed us by one of the bailiffs and we talked to them and at that time told them we would help them in any way we could and I did help him later with a letter at the request of Mr. Medina, Brady's stepfather.

Q. Before they were sentenced, did you have any discussion about obtaining a pardon or reduction of sentence?

A. No. This happened all very suddenly. The change of plea. In January, he was obdurate that he wanted to go before a jury and I hadn't made a sufficient investigation to feel that he didn't have some chance and I make it a policy never to try to force a fellow to take a [fol. 181] plea of guilty, and never to rush him either if there is plenty of time for suppression of evidence and other things of that nature. So, I never gave a thought to anything happening to him. He was going to be cleared by a jury up until we changed the plea.

Then, that was—let's see. We changed the plea, and it was a very short time in my opinion before we went for the sentencing. May fourth, I believe he was sentenced.

Q. Before he was sentenced, was there ever a time—

A. I don't recall ever making him any promise that we would work on a pardon. I know I did do that last time. I had not given any thought to anything but just the problems of the jury trial.

Q. Well, did you exert pressure on Mr. Brady?

A. To get him to change his plea?

Q. To get him to plead guilty?

A. No. As I say, I distinctly remember walking over to him when I had just learned the night before of the change of plea on the part of Tafoya, and anticipating that Tafoya would make a very damaging witness because of his statement, and another fact that I had to give weight to and that's in all my practice, I can't think

of any young man comparable to Tafoya in the matter of integrity. That is, he would not hold back anything, [fol. 182] and he would not lie was my experience.

MR. ADANG: I am going to object to that, Your Honor.

MR. McCARTY: I think that is relevant, Your Honor.

THE COURT: Yes. I am going to overrule the objection.

A. I had a boy there that just showed that he would tell anybody—

THE COURT: Anything that went into the determination of this man of what to tell his client, I am going to let him say it.

A. And so, I went to Brady and before I could get the words hardly out my mouth, he had also known of the Tafoya change of plea and he had been advised before as to the damaging statement, and he acquiesced and said, "Yes, I have thought it over and I have decided to change my plea."

So, he really made up his own mind before I ever discussed it, hardly.

* * * *

Q. (Mr. McCarty continuing.) You did after con- [fol. 183] ducting your investigation and making yourself aware of the facts of the case to the extent you could, and after discussing the matter with your client, you were satisfied personally that it was a proper plea at that time?

A. I don't believe I ever had a case where I had to do it. There would have been no chance before a jury and I can give some of the facts if the Court would like to know how impossible it was to take him before a jury with this case.

* * * *

CROSS EXAMINATION

BY MR. ADANG:

* * * *

[fol. 187] Q. (Mr. Adang continuing.) Mr. LaFollette, when did you first see Robert Brady in connection with this matter?

[fol. 188] A. The night that he had been arrested, I believe, or the day after.

Q. Do you recall the date of that?

A. Yes. That was January the wenty-first, I believe.

Q. He was arrested that afternoon and what happened?

A. I went down to the jail about five o'clock or four thirty.

Q. Was he the only one present when you saw him at that time?

A. Yes, and he gave me a copy of the Tafoya statement.

Q. He gave you a copy of the Tafoya statement at that time?

A. Yes, he did.

Q. Do you know how he came to have a copy of the Tafoya statement on the same day it was given?

A. Tafoya had given it to him, to the best of my recollection. He definitely had it. I have it here in my file, if you want to see it.

* * * *

[fol. 189] Q. What plea did Robert Brady want to enter at the time of that first meeting?

A. Well, all the way through he wanted to plead not guilty.

Q. All the way through up until what point?

A. Up until the day after David Chavez wrote us, wrote me that Tafoya was going to change his plea to guilty and that was about—I think that was about April the twenty-eighth or somewhere in April.

Q. Did you go see Robert Brady then?

[fol. 190] A. That's when I had the conversation in which he really beat me to the draw. I asked him—I said, "We have just learned about Tafoya."

"Oh, yes," he said, "I have been studying it over, too, and I think I want to change my plea to one of guilty."

Q. Was it your advice, then, after he said that that he should plead guilty?

A. Oh, yes. I said, "Well, I certainly believe that that's the wise thing to do," and I wrote Mr. Medina a letter at that time in which I explained all these circumstances of the evidence against him and that's why I recommended that he plead.

Q. Had you made up your mind at that time that he was guilty?

A. What?

Q. Had you made up your mind at that time that he was guilty?

A. Well, a lawyer doesn't necessarily make up his mind at any time. We never know for sure even after it is all over, but I had very good evidence against him in the file that had been furnished for my investigation that made it look very difficult for him before a jury.

I certainly had a feeling that he would be convicted beyond a shadow of a doubt.

[fol. 191] Q. Did you tell him that at any time?

A. Yes, several times.

Q. You told him that several times?

A. At least once, and I think I told him more than once.

Q. Did you tell him that if he went before a jury, he would certainly get the death penalty?

A. No. I told him, though, that we were afraid he would and therefore Judge Hatch had expressed in open court that he thought he might get the death penalty, and I think that it is enough to put a lawyer on notice.

Q. Did Judge Chavez say this either before or at the time of or after he pled guilty?

A. Oh, any conversation about the death penalty was prior to the sentencing, because that was deleted out before we pled guilty to it.

Q. When did this conversation take place with Judge Hatch?

A. Which one, now?

Q. The one when Judge Hatch said there was a possibility of the death penalty?

A. Well, he said that at the time of arraignment. If I am not mistaken, he said that—if I am not mistaken—he also admitted that at the time that we went to him and told him that we had decided to change our plea, [fol. 192] and he said, "Well, I think you are wise because there is—I would certainly recommend, submit the question of the death penalty to a jury."

Q. Then, as I understand it, you actually had a meeting in chambers with Judge Hatch?

A. And the U. S. Attorney.

Q. Before thy plea was ever changed?

A. Yes.

Q. What else took place at this meeting?

A. Well, I believe it was for the purpose of changing the plea.

Q. Who else was present besides yourself and Judge Hatch?

A. Mr. Espinosa and I and Judge Hatch and the young U. S. Attorney, if I am not mistaken.

Q. Was Judge Chavez there by any chance?

A. No, I don't believe he was. He might have been. Now, we had several conferences with the court.

Q. And then after this meeting, did you go back and tell Robert Brady that Judge Hatch thought if he went before a jury, he would get a death penalty?

A. No, but I told him, though, I thought he had a good chance of getting it and I still think that that was good advice.

Q. You never mentioned that conversation with Judge [fol. 193] Hatch?

A. Never mentioned to him what Judge Hatch had said?

Q. Yes.

A. It was in the paper, and he was present in the hearings when he mentioned it.

Q Well, maybe I misunderstood, but I thought you

had gone into Judge Hatch's chambers and that Judge Hatch had told you that he thought Mr. Brady would get the death penalty?

A. He told counsel. I guess Brady wasn't present. When we went in and told him that we thought we would change the plea, he said, "Well, I think you are very wise, because I was certainly going to submit the death penalty to the jury," and he had told us that previously, too.

Q. And didn't you also indicate to me a little bit earlier that Judge Hatch said he thought the jury would recommend a death penalty?

A. No. He said, "It is very likely that they will get the death penalty."

Q. Now, did you report this conversation to Robert Brady?

A. Well, I certainly did.

Q. You indicated, I believe, to Mr. McCarty that you had discussed possible sentences with Robert Brady, is [fol. 194] that correct?

A. Yes, we always do.

Q. And did you ever indicate to him that he would get a sentence of from ten to fifteen years if he plead guilty?

A. No, I indicated to him that he would get between whatever the maximum—we had the statute in the file and read it to him, and we said we didn't think that he would get the whole maximum, but we knew he wouldn't get the death penalty, and that we would make an earnest plea for mercy. There were some few extenuating circumstances that we submitted to Judge Hatch.

Q. Do you recall Judge Chavez or Mr. Espisona ever telling Mr. Tafoya that he would get a sentence of from five to seven years?

A. I certainly didn't. We had no more idea about the sentence, and I am sure none of the counsel told them anything definite. We certainly didn't appraise the Hatch sentence until it was imposed.

Q. Did you ever advise Robert Brady that if he went to trial, the confession of Mr. Tafoya could not be used against him?

A. Yes. I told him that I was satisfied we could keep that out as to him.

Q. Can you recall when you told him that?

[fol. 195] A. Well, I told him that during the progress of the preparation of the case. I couldn't tell you the date, though.

Q. Did you ever advise Mr. Brady of the possibility that he could plead not guilty and waive a jury trial or go to trial without a jury?

A. I wouldn't say whether we ever thought of going to trial without a jury because I'm convinced Judge Hatch would not have tried it without a jury.

Q. Well, did Judge Hatch ever tell you that?

A. I won't say that he didn't, but I don't remember that far back. We discussed many angles with Judge Hatch and the U. S. Attorney.

Q. And is it your testimony, then, that you can't recall whether you told Brady about this?

A. I believe it is. I wouldn't say whether anything was ever said about trying it without a jury.

Q. Did you ever discuss—

A. I believe Judge Hatch at one time, though, in a conference said he would not try it without a jury.

Q. When did this conference take place?

A. Well, one of the two or three conferences that the counsel had with him. That's the recollection, but very faint. I can't be sure.

Q. Now, do I understand it that counsel had two or [fol. 196] three conferences with Judge Hatch without the defendants being present?

A. Well, I won't say whether they were present or not. Most of the conversations were with him, with them present.

Q. Do you recall if Mr. Brady was present at this conversation that you think Judge Hatch said he would not try without a jury?

A. Yes. It would have been one of the official hearings.

Q. Would that be a hearing in which a transcript was made?

A. I wouldn't say. I have no recollection of the nature of it. I just have a faint recollection of it.

* * * *

[fol. 198] Q. Mr. LaFolette, did you ever investigate the possibility that Mr. Tafoya's confession was involuntary or coerced in any way or incorrect?

A. Yes, I investigated many angles for correctness. I had very little chance to investigate outside of Mr. Tafoya himself, and he admitted making the statement [fol. 199] and never did indicate to me, although we had joint conferences with he and Brady. He never indicated to me that he had changed his story.

Q. Well, did you discuss with Mr. Tafoya or his attorneys how the confession was made?

A. No, but I know that—I believe that they indicated it was made freely and voluntarily. I believe Tafoya said, "I gave them a free and full statement."

* * * *

[fol. 201] Q. Did they ever indicate to you that they wanted their son to plead not guilty?

A. No. They certainly didn't try to interfere with the technical side of the case. I wrote the letter after he had decided to plead guilty to Mrs. Medina, fully explaining because I knew a mother would be worrying to death about her son, and I wanted her to know that we would have gladly gone to trial if it was possible, and I think the letter would speak for itself. I have a copy of it here. It gives ample reasons for pleading guilty.

* * * *

[fol. 202] Q. Was it your testimony, Mr. LaFolette, [fol. 203] that you had told Mr. Brady that with his case, he could not go before a jury?

A. I didn't feel he could with my experience as a lawyer.

Q. When you said that, what did you mean?

A. I meant that there was just so many damaging facts that we just couldn't go to a jury.

Q. Why couldn't you go to a jury?

A. Because it would be almost sure conviction and possibly a death penalty.

* * * *

[fol. 211] THE COURT: Well, I am just holding that [fol. 212] the statute isn't unconstitutional for whatever way anyone wants to take it, you or the circuit court or whoever it is. I am holding that the statute is constitutional.

MR. ADANG: All right, sir. My belief is that Judge Gordon ruled on two grounds: That the court could impanel an advisory jury in any event and secondly, that a recommendation of the death penalty was not binding upon the court, and I think that point two which is briefed in our memorandum brief deals with that, and I think that the manner in which Judge Hatch interpreted the act at that time and cited it to the defendants withdrew the possibility before they pled guilty that he could impanel an advisory jury. I think it is—

THE COURT: All that a jury could have done if Judge Hatch had ruled the other way was to decide whether or not the man should have the death penalty or not and since Judge Hatch didn't impose the death penalty, why the man wasn't hurt any by Judge Hatch not calling a jury to decide whether he should be put to death or not. Since Judge Hatch took the lesser view, why, I don't think the man was hurt and has anything to complain amout by Judge Hatch not calling a jury.

MR. ADANG: Well, I respectfully disagree with the Court on that. The question is whether there is a different penalty if you plead not guilty than if you plead [fol. 213] guilty. Is there a greater penalty for pleading not guilty, and the possibility exists.

THE COURT: You may make your record, but the Court's going to hold that this man pleaded guilty voluntarily, regardless of what Judge Hatch said or didn't say before; that without regard to that, this man pleaded guilty voluntarily. His lawyer has been here and testified, a man with many, many years of experience. He testified that in his opinion, why, the plea of guilty was proper and in his opinion it was voluntarily given; that

in his opinion this man made up his mind to do it by reason of the fact that the other defendant decided to plead guilty and not because of anything that he or Judge Hatch or anyone else said, and so I am going to hold that this man's plea was voluntarily given without any duress, without any threats, without any promises, or without anything.

* * * *

[fol. 214] MR. ADANG: Your Honor, although the petition itself didn't raise the question, the brief in support of it did raise the issue of competency of counsel.

THE COURT: Well, the Court's going to hold that the attorneys for this man were competent attorneys. There isn't any question in my mind but what those men knew what they were doing and that they are very competent. It isn't a question of whether someone makes a mistake or doesn't make a mistake. The only question is whether they are competent counsel and the opinion of the Court is they were competent counsel.

* * * *

DEFENDANT'S EXHIBIT 1

SUPREME COURT OF NEW MEXICO
SANTA FE, NEW MEXICO

Chief Justice
David Chavez, Jr.

Lowell C. Green
Clerk

Justices
M. E. Noble
Irwin S. Moise
J. C. Compton
David W. Carmody

Received Mar. 7, 1968,
U. S. Attorney's Office, Albuquerque, N. M.

Filed at Albuquerque, N. M., Mar. 20, 1968,
E. E. Greeson, Clerk.

March 6, 1968

RE: Robert M. M. Brady v. United States
Civil No. 7269

Mr. Scott McCarty
Assistant U. S. Attorney
P.O. Box 607
Albuquerque, New Mexico
87103

Mr. Peter J. Adang
Attorney at Law
Simms Building
Albuquerque, New Mexico
87101

Gentlemen:

Replying to Mr. McCarty's letter of February 28, 1968, I beg to advise as follows:

1. My name is David Chavez, Jr. and, during the pertinent period, i.e., the winter and late spring of 1959, I was engaged in the practice of law with offices in Santa Fe, New Mexico.

   About the middle of February or early in May 1959, I was retained by the father of Alfonso P. Tafoya in Criminal Cause No. 19,847, United States District Court for the District of New Mexico. The father

of Alfonso Tafoya is Daniel Tafoya, or Dan Tafoya as we call him, and he is my nephew. Dan Tafoya spoke to me and asked if I would represent Alfonso and I advised him that I would.

2. To the best of my recollection, all of my conversations were with Alfonso P. Tafoya and his father. I did not represent Robert M. Brady and, in fact, knew that he was represented by Robert H. LaFolette and possibly Gilbert Espinosa. As far as I can recall, I did not have any conversations with Brady, or with Brady and Tafoya together. I might also add that I had no reason for talking to Brady. * * *

3. No statements were made by me to Brady or to anyone else as to reduction of sentence or as to executive clemency, if a plea of guilty was entered. As far as I know, being properly represented by counsel, Brady entered a plea of guilty. Tafoya also entered a plea of guilty. I can only speak for myself and not for anyone else connected with the case.

Very truly yours,

/s/ David Chavez, Jr.

DC:ms

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 25, 1968

Comes now the United States of America by John Quinn, United States Attorney for the District of New Mexico, and Scott McCarty, Assistant United States Attorney for said District, and moves the Court to make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

The plea of guilty entered in Criminal Cause No. 19,847, United States v. Brady, United States District Court for the District of New Mexico, was freely and voluntarily made.

II.

Counsel for the Petitioner did not exert pressure upon the applicant for him to plead guilty in that said cause.

III.

No representations were made by counsel that would have the effect of rendering the plea of the Petitioner less than fully voluntary.

IV.

No representations were made by anyone which created in the mind of the defendant any belief that a promise had been made prior to his entry of a plea of guilty

that action would be taken on his behalf upon his being sentenced to reduce the sentence he might receive or to obtain executive clemency in any manner.

CONCLUSIONS OF LAW

I.

The statute under which Petitioner was prosecuted in Criminal Cause No. 19,847, United States v. Brady, United States District Court for the District of New Mexico, is constitutional.

II.

The sentence in that said cause is not subject to vacation or collateral attack.

UNITED STATES OF AMERICA
JOHN QUINN
United States Attorney

/s/ Scott McCarty
Assistant U. S. Attorney

THIS WILL CERTIFY that a true copy of the foregoing pleading was mailed to opposing counsel of record this 25th day of March, 1968.

/s/ Scott McCarty
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PETITIONER, ROBERT M. BRADY—Filed March, 25, 1968

Comes Now the Petitioner, ROBERT M. BRADY, and moves the Court to make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

Robert M. Brady, hereinafter called the "Petitioner", pled guilty to a charge of violating 18 U.S.C. § 1201 on April 30, 1959, and was thereafter sentenced to a term of fifty (50) years imprisonment by the Hon. Carl A. Hatch, United States District Judge for the District of New Mexico.

II.

After his arrest for violation of 18 U.S.C. § 1201, on or about January 21, 1959, the Petitioner retained Robert H. LaFollette, Esq., as his attorney. The Petitioner did not retain any other attorney nor was any other attorney retained with his consent to represent him.

III.

Alphonso Pedro Tafoya, the Petitioner's co-defendant, was arrested for violation of 18 U.S.C. § 1201 on or about the same date as the Petitioner. Alphonso Pedro Tafoya signed an alleged confession on that date, which confession was of questionable validity in view of the

circumstances surrounding its taking: to wit, that Alphonso Pedro Tafoya was purported to be an alcoholic; that the alleged confession was typewritten by a police officer; and, that the co-defendant was unable to read the statement before signing it.

IV.

Alphonso Pedro Tafoya retained, or had retained on his behalf, Gilberto Espinosa, Esq., and David Chavez, Esq., as his attorneys.

V.

Both the Petitioner and the co-defendant, Tafoya, pled not guilty to the charge of violation of 18 U.S.C. § 1201 at their arraignment.

VI.

After arrest the Petitioner was incarcerated in the Albuquerque City Jail for a period of approximately two (2) weeks. The co-defendant, Tafoya, was also in the City Jail. Both defendants discussed the case and intended to maintain their plea of not guilty and to defend the case. During this period of time, the Petitioner was unaware that the co-defendant, Tafoya, had signed a confession.

VII.

While he was in City Jail, the Petitioner talked on one or more occasions with his attorney, Mr. LaFollette. At such times, both Mr. Espinosa and the co-defendant, Tafoya, were present. The Petitioner persisted in his plea of not guilty on each such occasion.

VIII.

After approximately two weeks, the Petitioner and the co-defendant, Tafoya, were transferred by the authorities to the Santa Fe County Jail. The Petitioner remained in the Santa Fe County Jail for approximately one and one-half months. While in the Santa Fe County Jail, the Petitioner and the co-defendant, Tafoya, dis-

cussed the case and both intended to maintain their pleas of not guilty. During this period of time, the Petitioner remained unaware that the co-defendant, Tafoya, had signed a confession.

IX.

While he was in the Santa Fe County Jail, the Petitioner conferred with his attorney, Robert H. LaFollette, on only one occasion. At that time, Gilberto Espinosa was present. At this meeting, the Petitioner and his attorney discussed the defense of the case. No mention was made of a possible change of plea.

X.

After approximately one month in the Santa Fe County Jail, the Petitioner wrote a letter to the Court requesting a transfer back to Bernalillo County on the ground that his attorney would not make the trip to Santa Fe to consult with him. Shortly thereafter, the Petitioner was transferred back to the Albuquerque City Jail. The co-defendant, Tafoya, remained in the Santa Fe County Jail, however.

XI.

After the Petitioner was removed to the Albuquerque City Jail, the co-defendant, Tafoya, was visited by one of his attorneys, Dr. David Chavez, formerly a United States District Judge and now Chief Judge of the Supreme Court of New Mexico. The co-defendant is a blood relation of David Chavez and was a blood relation of the then United States Senator Dennis Chavez, now deceased.

XII.

At this meeting, Mr. Chavez discussed with the co-defendant, Tafoya, the merits of his case. He prevailed upon the co-defendant, Tafoya, to change his plea to guilty. It was represented to the co-defendant, Tafoya, that he would receive a sentence of from five (5) to seven (7) years and that the Chavez family would work to get him a pardon or clemency after he went to prison.

XIII.

The Petitioner did not see his attorney again until on or about April 21, 1959. At the meeting, the Petitioner, Robert H. LaFollette, Gilberto Espinosa, David Chavez and the co-defendant, Tafoya, were present.

XIV.

At the meeting of April 21, 1959, Robert H. LaFollette, Gilberto Espinosa and David Chavez all attempted to convince the Petitioner to plead guilty. The Petitioner was shown, for the first time, the confession of the co-defendant, Tafoya. He was told by the attorneys present that he had no defense to the charge under 18 U.S.C. § 1201.

XV.

The Petitioner requested information as to the possible penalties involved. He was told that if he continued to plead not guilty, it was very likely that a jury would recommend the death penalty. He was told by one or more of the attorneys present that if both defendants pled guilty, the co-defendant, Tafoya, would receive a sentence of from five (5) to seven (7) years and the Petitioner would receive a sentence of double that amount. The attorneys for the co-defendant, Tafoya, again stated that his family would work to get him a pardon or executive clemency. Mr. Espinosa, an attorney for the co-defendant, Tafoya, told the Petitioner that the Chavez family would do the same for him.

XVI.

Under the pressure of the advice of his attorney and the attorneys for the co-defendant, Tafoya, and the representation of Tafoya's attorney that the Chavez family would aid him, the Petitioner reluctantly consented to change his plea to guilty. At that time, he believed himself to be innocent, however.

XVII.

After the meeting of April 21, 1959, the three attorneys involved met with the Hon. Carl A. Hatch in chambers to discuss a possible change of plea for both defendants. At that meeting, Judge Hatch stated to counsel that it was his opinion that if the defendants went before a jury, they would probably get the death penalty. This comment was conveyed to the Petitioner by his attorney prior to the time he changed his plea to guilty.

XVIII.

On April 30, 1959, the Petitioner and the co-defendant, Tafoya, formally changed their pleas to guilty. At that time, the Petitioner believed himself to be not guilty. When the Court asked him if there were any agreements or understandings, he replied in the negative because his attorney told him that if he did not give that answer the Court would not accept his plea of guilty.

XIX.

After the plea of guilty was entered, the Petitioner was interviewed by a United States Probation Officer. The information conveyed to said officer apparently caused the latter to believe that the guilty plea of the Petitioner was not voluntary and the information in the pre-sentence report of the United States Probation Office caused the Court, on May 8, 1959, to question the Petitioner with respect to the voluntariness of his plea of guilty.

XX.

The Petitioner still believes that he is innocent of the charge under 18 U.S.C. § 1201.

XXI.

At no time did the Petitioner's attorney advise him that the confession of the co-defendant, Tafoya, could not be used against him at a trial.

XXII.

At no time did the Petitioner's attorney conduct an investigation into the voluntariness of the co-defendant, Tafoya's, alleged confession.

XXIII.

At no time did the Petitioner's attorney advise the Petitioner of, or conduct an inquiry into the possibility of the Petitioner pleading not guilty and trying his case to the Court without a jury.

XXIV.

The Petitioner's attorney allowed him to plead guilty with the knowledge that the Petitioner believed himself to be innocent and was only pleading guilty because he feared the death penalty and understood that, if he pled guilty along with the co-defendant, Tafoya, he would either be pardoned or receive clemency through the efforts of the Chavez family.

XXV.

The Petitioner's attorney conducted all conferences with the Petitioner in the presence of either the co-defendant, Tafoya, or his attorneys, or both, knowing that the interests of the co-defendant, Tafoya, were possibly adverse to those of the Petitioner.

XXVI.

The Petitioner entered a plea of guilty on April 30, 1959, to the charge under 18 U.S.C. § 1201 only because of pressure from his attorney, representations that a politically influential family would work to get him a pardon or clemency and fear of the death penalty.

XXVII.

The Petitioner did receive executive clemency after being sent to prison. As a consequence, his sentence was reduced to thirty (30) years. This clemency was obtained without any effort on the part of the Petitioner.

XXVIII.

Prior to the entry of a plea of guilty by the Petitioner, the Court stated that, if he pled guilty, it would not empanel an advisory jury to consider the question of the death penalty.

XXIX.

Prior to the entry of a plea of guilty by the Petitioner, the Court represented that, if a jury recommended the death penalty after a trial, such a recommendation would be binding upon the Court.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter.

II.

The Court is empowered to inquire into the voluntariness of the plea of guilty of the Petitioner to a charge under 18 U.S.C. § 1201.

III.

The plea of guilty of the Petitioner entered on April 30, 1959, was not voluntary for the following reasons:

(a) The Petitioner was improperly advised of his rights by his attorney in that he was not told that the confession of his co-defendant, Tafoya, could not be used against him and he was not advised of the possibility that he could plead not guilty and try his case to the Court with a jury;

(b) The Petitioner understood, and pled guilty on the basis of this understanding, that if he pled guilty, a politically powerful and influential family in New Mexico would work to get him a pardon or executive clemency;

(c) The Petitioner feared the possibility of the death penalty, particularly in light of the statement by Judge Hatch that if he pled not guilty, the jury would most likely recommend the death penalty; and

(d) The attorneys involved, Robert H. LaFollette, Gilberto Espinosa and David Chavez, along with Judge Hatch, all made a predetermination of the Petitioner's guilt and their comments and advice were calculated and designed to, and did, coerce the Petitioner into a plea of guilty.

IV.

18 U.S.C. § 1201 (a) is unconstitutional for the reason that it coerces a guilty plea and thereby induces an accused to forego his right to a trial by jury, which right is guaranteed by the Sixth Amendment to the Constitution.

V.

If 18 U.S.C. § 1201 (a) is not unconstitutional, Judge Carl A. Hatch interpreted and applied the statute in such a way as to coerce the Petitioner into pleading guilty and foregoing his right to a trial by jury.

VI.

The judgment and sentence against the Petitioner should be vacated and the Petitioner should be allowed to enter a plea of not guilty to the charge against him.

/s/ Peter J. Adang
Attorney for Petitioner
P. O. Box 2168—1200 Simms Bldg.
Albuquerque, New Mexico

I HEREBY CERTIFY that I have delivered a copy of the foregoing to all counsel of record, this 25th day of March, 1968.

/s/ Peter J. Adang

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 7269 Civil

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MEMORANDUM DECISION AND ORDER—March 27, 1968

This shall constitute the findings of fact and conclusions of law of the Court.

This was a proceeding brought under Section 2255 of Title 28 of the United States Code, wherein Robert M. Brady brought a petition against the United States of America requesting that his plea of guilty be set aside and that his sentence be revoked. He claims two grounds for this. He first contends that Section 1201(a) of Title 18 of the United States Code is unconstitutional. Secondly, he claims that he was coerced in some way in making his plea of guilty. In this connection, he alleges that Judge Hatch, who conducted the proceeding, failed to live up to Rule 11 of the Federal Rules of Criminal Procedure, and he claims that his attorney, Robert Hoath LaFollette, Jr., was either incompetent or that he did not properly represent him in this proceeding. The Court hereby rules against him on all points, and has denied, and does hereby deny, any relief under Section 2255 of Title 28 of said Code.

The Court will first discuss the question of the constitutionality of the statute. The petitioner places his reliance upon *Jackson* v. *U.S.*, 262 Fed. Supp. 716. A copy of the Decision and Order of Judge Timbers is attached to the petitioner's pleadings. That case has been appealed by the United States and, it is the understanding of this Court, that the same is before the Supreme Court of the United States at this time. An illuminating case

concerning this statute is *Robinson* v. *United States*, 264 Fed. Supp. 146, decided by Judge Gordon in the Western District of Kentucky. The Robinson case is not exactly like our case, but in any event, Judge Gordon respectfully disagreed with Judge Timbers concerning the constitutionality of the statute. It is true that Judge Gordon took the position that if a jury recommended the death penalty, that such was advisory and that the Court could refuse to follow the recommendations of the jury by doing various things mentioned in the opinion.

It does not appear to me that the statute is unconstitutional, and I so hold. It has been before the courts on many occasions, although the precise point raised here has probably not been raised except in the Timbers case. However, this Court respectfully differs with Judge Timbers about this matter.

The question has been raised that the petitioner was coerced into pleading guilty because he was afraid to ask for a jury trial and take the chances on getting a death sentence. Some question has been raised about the acts of Judge Hatch in this regard. After hearing the evidence, the Court was of the opinion, and now finds, that the petitioner decided to plead guilty when he learned that his co-defendant was going to plead guilty, and that his determination had nothing to do whatsoever with anything that Judge Hatch said or with what his attorneys might have said. The Court finds that the petitioner knew all about the confession given by his co-defendant. The Court further finds that Mr. LaFollette thoroughly explained to the petitioner that the written confession could not be used against the petitioner. However, after Tafoya pled guilty, he could have testified against the petitioner and that fact was fully known by the petitioner when he changed his plea. The Court further finds that the plea of guilty was made by the petitioner by reason of other matters and not by reason of the statute nor by reason of any acts of conduct of Judge Hatch. It is the conclusion of the Court that the statute is constitutional and that the proceedings before Judge Hatch are constitutional.

The Court finds the facts against the petitioner. The Court finds that Judge David Chavez represented the defendant Tafoya and that Mr. Gilberto Espinosa helped him. It is true that Mr. Espinosa made a plea in behalf of Brady, as well as Tafoya, before Judge Hatch, and that he helped Mr. LaFollette, at the request of Mr. LaFollette, in this final appearance. However, Mr. LaFollette was the only paid attorney that the petitioner had. The Court finds that Mr. LaFollette made a trip to El Paso, Texas, and investigated the case very fully. The Court further finds that he made investigations in this area, including a review of what the Government witnesses might testify to. The Court finds that Mr. LaFollette also made a considerable investigation of the law pertaining to the case and that he represented the petitioner in a very efficient manner. The Court finds that Mr. LaFollette told the petitioner all of the facts and circumstances surrounding the case, including the pertinent law, and that the petitioner decided, on his own volition, to plead guilty. It is true that Mr. LaFollette had decided, on his own investigation, that it was best for the petitioner to plead guilty, but that the petitioner had already decided the same thing before he talked to Mr. LaFollette.

The Court further finds the petitioner knew that Tafoya was going to plead guilty before he consulted with his attorney in this regard. The Court does not believe that the petitioner first learned of the Tafoya statement shortly before he pled guilty. The Court finds that he was told about it when he was first interviewed by Mr. LaFollette. The Court further finds that any comments of Judge Hatch were not relayed to the petitioner before he decided to change his plea to guilty. The Court further finds that no pressures were put upon the petitioner by his attorney, or anyone else, to plead guilty to the charge, but that he pled guilty freely and voluntarily.

The petitioner further contends that he pled guilty because his co-defendant Tafoya was kin to Senator Chavez and Judge Chavez and that representations had been made to him that if he would plead guilty, that he would receive clemency. He further contends that he

was assured that he would receive a prison sentence of between ten to fifteen years, if he would plead guilty. The Court finds against the petitioner on these contentions and finds that no representations were made to him. It is clear from reading the entire record that Judge Hatch had never made any such representations and the Court finds that the lawyers made no such representations. The lawyers did express their opinions concerning the length of sentence to the best of their judgment. In other words, the attorneys told the petitioner that they would do what they could for him, but that the petitioner knew that such were only the recommendations of the lawyers and not promises of any kind.

With regard to the claim of clemency, the Court finds that no promises were made at any time. The Court further finds that the guilty plea was entered without any promise, representation, or coercion whatsoever.

The Court concludes that the statute in question is constitutional and that the plea was voluntarily and knowingly made. The Court concludes that no representations, threats, promises, or coercion of any kind was communicated to the petitioner and that his plea was knowingly and voluntarily made. The Court further concludes that the petitioner was represented by competent counsel who had had many years of experience in criminal law, and that a full and adequate investigation had been made by such counsel before the entry of the plea.

The Court concludes that the petitioner has not shown any grounds for any relief in this proceeding and that the proceeding should be, and it is hereby dismissed, with prejudice.

All of the requested findings of fact and conclusions of law which are contrary, or opposed to those contained above, are hereby denied.

Dated at Albuquerque this 27th day of March, 1968.

/s/ H. Vearle Payne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER—Filed March 27, 1968

This matter having come on for hearing on motion of the Petitioner, Robert M. Brady, to vacate sentence and collaterally attack judgment pursuant to Title 28, Section 2255, U. S. Code as Annotated, and the Court having heard testimony and received evidence and having heard argument of counsel and being otherwise fully advised in the premises, it is, therefore,

ORDERED that the petition be and the same hereby is denied.

/s/ H. Vearle Payne
United States District Judge

APPROVED AS TO FORM:

/s/ Peter J. Adang
PETER J. ADANG
Attorney for Petitioner

/s/ Scott McCarty
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

NOTICE OF APPEAL—Filed April 11, 1968

Notice is hereby given that the Petitioner, ROBERT M. BRADY, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order entered herein on March 27, 1968, denying his Petition under Title 28, U. S. C. Section 2255.

/s/ Peter J. Adang
Attorney at Law
P. O. Box 2168—1200 Simms Bldg.
Albuquerque, New Mexico
Attorney for Petitioner

I HEREBY CERTIFY that I have mailed a copy of the foregoing to all counsel of record, this 10th day of April, 1968.

/s/ Peter J. Adang

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MOTION—Filed April 29, 1968

Petitioner, ROBERT M. BRADY, by his attorney, hereby moves the Court for an Order granting him leave to proceed with his appeal in Forma Pauperis and without pre-payment of fees, costs and security therefor, and in support of said Motion, attaches hereto as exhibit "A", his Affidavit.

/s/ Peter J. Adang

I HEREBY CERTIFY that I have mailed a copy of the foregoing to all counsel of record, this 29th day of April, 1968.

/s/ Peter J. Adang

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

Filed at Albuquerque, Apr. 29, 1968,
E. E. Greeson, Clerk.

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

AFFIDAVIT

STATE OF KANSAS)
) ss.
COUNTY OF LEAVENWORTH)

ROBERT M. BRADY, being first duly sworn, upon his oath, deposes and states that:

1. Because of his poverty, he is unable to pay the fees and costs of appealing the Order of the Court entered herein, or to give security for such fees and costs.

2. He believes that he is entitled to redress and a reversal of the aforesaid Order of the Court.

3. The issues which he intends to present on said appeal are those which were presented in his Petition under Title 28, U. S. C. Section 2255, all of which were denied by the Court.

/s/ Robert M. Brady
ROBERT M. BRADY

Subscribed and sworn to before
me this 16 day of April, 1968.

/s/ Perry R. MacPee
Notary Public.
My Commission Expires: .....
Parole Officer

"Authorized by the Act of July 7, 1955
to administer oaths (18 U.S.C. 4004)."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 7269

[File Endorsement (Omitted in Printing)]

ROBERT M. BRADY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER—April 29, 1968

This matter having come on for hearing on the Motion by the Petitioner, ROBERT M. BRADY, for leave to prosecute his appeal from the Order of the Court entered herein on March 27, 1968, in Forma Pauperis, the Court being fully advised in the premises, and having found that the Petitioner is unable to pay the fees and costs of appeal or to give security therefor, and further finding that the appeal is taken in good faith and is not taken frivolously, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the Petitioner, Robert M. Brady, hereby is granted leave to prosecute his appeal in Forma Pauperis, and the Court Reporter is hereby directed to prepare an original and one copy of all the proceedings in this cause, including but not limited to all proceedings had at the hearing, to be prepared at the expense of the judiciary appropriation, administered by the Administrator of the United States Courts.

/s/ H. Vearle Payne
Judge, United States District Court

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 10110—NOVEMBER TERM, 1968

[File Endorsement Omitted]

ROBERT M. BRADY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of New Mexico

(District Court No. 7269)

PETER J. ADANG for Appellant.

JOHN A. BABINGTON, Assistant United States Attorney (John Quinn, United States Attorney, was with him on the brief) for Appellee.

Before JONES *, BREITENSTEIN and HOLLOWAY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

OPINION—Filed December 17, 1968

Appellant seeks § 2255 relief from a 50-year sentence imposed on his guilty plea to a violation of the Federal Kidnaping Act. 18 U.S.C. § 1201. The district court held an evidentiary hearing and denied relief.

In United States v. Jackson, 390 U.S. 570, the Court held that the death penalty provision of the Federal Kid-

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* Of the Fifth Circuit, sitting by designation.

naping Act imposed an impermissible burden on the exercise of a constitutional right but that such provision is separable and does not destroy the remainder of the Act. The Court recognized that the presence of the proscribed provision did not imply that every guilty plea was involuntary. Id. at 583.

Voluntariness is a question of fact and all matters which bear thereon must be considered. See McFarland v. United States, D.C.Md., 284 F.Supp. 969, 977. The appellant and one Tafoya were charged jointly. Appellant was represented by attorney LaFollette who was retained almost immediately after appellant's arrest. Tafoya was represented by retained attorneys Espinosa and Chavez. At the § 2255 hearing, appellant, his codefendant Tafoya, LaFollette, and Espinosa testified. On agreement of counsel a letter from Chavez, then Chief Justice of the Supreme Court of New Mexico, was received in evidence. The testimony of the lawyers and of their clients was in sharp conflict. The trial court chose to believe the lawyers and said:

> "The Court further finds that the plea of guilty was made by the petitioner by reason of other matters and not by reason of the statute nor by reason of any acts or conduct of Judge Hatch [the sentencing judge]."

The other matters included appellant's knowledge at the time LaFollette was retained of Tafoya's confession, LaFollette's report to appellant of his investigation including a review of prospective testimony of government witnesses, knowledge that Tafoya would plead guilty, and LaFollette's advice on legal issues including the inadmissibility of Tafoya's confession and the possibility that Tafoya would testify against appellant. The finding of the trial court that the guilty plea was not made because of the statute but because of other matters is supported by substantial evidence and is binding on us. We are convinced that the appellant voluntarily pleaded guilty.

The other points raised deserve little consideration. The findings dispose of the claims of promises regarding sentence and executive clemency. The findings and the

evidence amply show competence of counsel. The exclusion of the mother's testimony of her conversation with Tafoya's mother was proper under the hearsay rule. Neither the presentence report nor the subsequent grant of executive clemency had anything to do with the voluntariness of the plea.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before Judges WARREN L. JONES, JEAN S. BREITENSTEIN and WILLIAM J. HOLLOWAY, JR., Circuit Judges.

10,110

ROBERT M. BRADY, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of New Mexico

JUDGMENT—December 17, 1968

This cause came on to be heard and was argued by counsel. On consideration whereof it is ordered that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER
Clerk

By /s/ Helen R. Bartha
Deputy Clerk

On January 23, 1969, the mandate of the United States Court of Appeals for the Tenth Circuit, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of New Mexico.

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SUPREME COURT OF THE UNITED STATES

No. 1925 Misc., October Term, 1968

ROBERT M. BRADY, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 23, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1558, placed on the summary calendar and set for oral argument immediately following No. 1064.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 361905 153

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

PETITION NOT PRINTED

RESPONSE NOT PRINTED

No. 270

ROBERT M. BRADY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S BRIEF

PETER J. ADANG, Esq.
800 Public Service Building
Post Office Box 2168
Albuquerque, New Mexico

Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 270

ROBERT M. BRADY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S BRIEF

Citations to Opinions Below

The opinion of the United States District Court for the District of New Mexico is unreported. The opinion of the United States Court of Appeals for the Tenth Circuit affirming the District Court's decision is reported at 404 F.2d 601 (10th Cir. 1968).

Jurisdiction

The Order of the United States Court of Appeals for the Tenth Circuit affirming the Order of the United States District Court for the District of New Mexico was entered on December 17, 1968. On application for extension of time to file Petition for Writ of Certiorari on March 13, 1969, an Order Extending Time to File Petition for Writ of Certiorari was entered extending the time for filing said Petition to and including April 16, 1969. The Petition for Writ of Certiorari was granted on June 23, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

(1) Whether the decision of *United States* v. *Jackson* should be given retroactive application to guilty pleas under the Federal Kidnaping Act entered prior to the effective date of that decision.

(2) If the decision in *United States* v. *Jackson* is to be given retroactive effect, should the test to determine the voluntariness of guilty pleas under the Federal Kidnaping Act be whether the selective death penalty provision of the Act "needlessly encouraged" a guilty plea?

(3) Whether the selective death penalty provision of the Federal Kidnaping Act "needlessly encouraged" Petitioner's guilty plea to a kidnaping indictment, thereby discouraging the exercise of his right not to plead guilty, in violation of the Fifth Amendment, and deterring the exercise of his right to demand a jury trial, in violation of the Sixth Amendment.

Constitutional and Statutory Provisions Involved

Constitution of the United States:

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence (sic) to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence (sic).

Statutes:

United States Code Annotated

Title 18, Section 1201(a):

Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized,

confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Title 28, Section 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to

render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Statement of the Case

On January 27, 1959, Robert M. Brady, hereinafter referred to as "Petitioner", was indicted by the grand jury of the United States District Court for the District of New Mexico, for violation of 70 Stat. 1043, 18 U.S.C. 1201, commonly referred to as the "Federal Kidnaping Act" (A. 13). It was charged in the indictment that, on or about Janu-

ary 18, 1959, Petitioner and one Alfonso Pedro Tafoya did unlawfully seize, kidnap, hold and abduct another person; that they knowingly caused the victim to be transported in interstate commerce; and, that said *victim was not liberated unharmed.* (*Ibid.*) Alfonso Pedro Tafoya was indicted with the Petitioner under the same indictment. (*Ibid.*)

On January 28, 1959, Petitioner and Tafoya were arraigned in the United States District Court before the Honorable Carl A. Hatch, United States District Judge, now deceased, and both defendants entered pleas of not guilty (A. 23-25). Thereafter, on April 30, 1959, both defendants were again brought before Judge Hatch, and they changed their pleas from not guilty to guilty (A. 26-28). On May 8, 1959, defendants came before Judge Hatch for sentencing and were each sentenced to fifty years imprisonment (A. 29-32). The Petitioner was thereafter incarcerated in Leavenworth Penitentiary (A. 39). His sentence of fifty years imprisonment was reduced to thirty years by executive clemency (A. 46).

On September 20, 1967, Petitioner filed in the United States District Court for the District of New Mexico a "Motion to Vacate Sentence and Collaterally Attack Judgment Pursuant to Title 28, Section 2255, United States Code, as Annotated" (A. 4-20). Among the grounds stated in the motion was the allegation that his plea of guilty was coerced and not entered freely and voluntarily. The basis for the contention was the argument that the death penalty provision of 18 U.S.C., Sec. 1201(a), was unconstitutional, in that it coerced a guilty plea and deprived Petitioner of the free exercise of his right to a trial by jury, both in violation of the Fifth and Sixth Amendments to the Constitution of the United States. There were a number of

other grounds stated in the motion, but these are not at issue in this proceeding.

On December 14, 1967, a pre-trial conference was held on Petitioner's motion to vacate sentence (A. 36). At that time, the case of *United States* v. *Jackson,* 390 U.S. 570 (1968), was then pending before this Court. Petitioner's counsel suggested that the district court defer hearing on the motion until this Court had rendered a decision in the *Jackson* case. (*Ibid.*) The suggestion was rejected by the district court, and the motion came on for hearing before the district court on March 20, 1968. (*Ibid.*)

At the hearing, the evidence was that, after his plea of not guilty, and before his change of plea, Petitioner was in the Albuquerque City Jail; was then transferred to the Santa Fe Jail; and, was later transferred back to Albuquerque (A. 39, 41-43). After the entry of a plea of not guilty, he talked with his attorney on at least one occasion in Albuquerque and expressed a desire to continue to plead not guilty (A. 40). While Petitioner was in the Santa Fe Jail, he still persisted in his not guilty plea (A. 41-42). After returning to the Albuquerque City Jail from Santa Fe, he still desired to plead not guilty (A. 42-43). Petitioner testified further that between the time he entered the plea of not guilty and April 30, 1959, when he changed his plea, he had been reading the local newspapers, and he was aware from them that if he went before a jury on a plea of not guilty, the maximum sentence could be the death penalty (A. 48-49). Up until the time that he learned of his co-defendant's confession, however, he felt that he would be found innocent by a jury (A. 49).

Petitioner said that he first learned of Tafoya's confession when his mother went down to the Albuquerque

City Jail and told him that Tafoya was going to plead guilty (A. 47-48). The first time that he actually saw the confession was when he met with his co-defendant and all the attorneys, in a room in the Federal Courthouse (A. 43). The purpose of the meeting, according to Mr. Gilberto Espinosa, one of the attorneys involved, was "concerning the plea that Brady would enter". "Tafoya had . . . made up his mind and informed . . . [the attorneys] that he was ready to plead guilty" (A. 57). After Petitioner read the confession, which "definitely" incriminated him, he was "told that there was no defense" and "all . . . [he] could do was plead guilty, . . ." (A. 44). Petitioner felt at that point that he "had no choice but to plead guilty." (*Ibid.*) He felt that, with Tafoya intending to plead guilty, a jury would not believe him (A. 45). His attorney told him that if he went to trial before a jury, there was "a great possibility . . . that [he] would be given the death sentence" (A. 44). He therefore decided to plead guilty because of his "attorney, statements by Alfonso Tafoya, *the great risk of a death sentence*" (emphasis added) (A. 45). He did not believe that he was guilty when he so pled (A. 45), and he has never believed that he was guilty (A. 49). When he was questioned by the district court about the voluntariness of his plea, he "reluctantly" let it stand so as not to have it rejected (A. 45-46). The district judge apparently felt that there was something in the pre-sentence report which raised a question about the voluntariness of Petitioner's guilty plea, because the court further questioned Petitioner about the plea at the sentencing hearing (A. 29). Since that time, Petitioner has filed many motions to have his plea vacated, but only this one has been considered (A. 46).

Petitioner's mother testified that, prior to the time that he changed his plea from not guilty to guilty, she went down to the Albuquerque City Jail to see him, but could not get in because her visit wasn't during regular visiting hours (A. 38). She went around to the back of the jail into an alleyway and called for her son. (*Ibid.*) When he came to the cell window, she called up to him, "For God's sake, plead guilty. They are going to give you the death sentence" (A. 38, 47-48).

Petitioner's co-defendant, Alfonso Tafoya, testified that his attorneys "told" him to plead guilty (A. 52), because he would "get the death sentence if [he] was found guilty; that there was no alternative. . . ." (A. 53). He said that his attorneys told him that if he pled guilty, he would "get five to seven years." (*Ibid.*) He confirmed that Petitioner intended to persist in his plea of not guilty until a meeting with Tafoya and all of the attorneys some time prior to April 30, 1959 (A. 50-51, 53). At that meeting, Tafoya said that the attorneys discussed with him and the Petitioner the possibility of the death penalty. The attorneys "told [him] that [he] would get the death sentence if [he] pled not guilty and was found guilty; that [he] would get the death sentence", and that "scared" him (A. 54, 55).

The attorneys for both defendants also testified at the hearing on the motion. Mr. Gilberto Espinosa, the attorney for the co-defendant, Tafoya, also confirmed that, prior to the meeting of the defendants and their attorneys in the Federal Building, Petitioner indicated he did not want to plead guilty (A. 59), and that meeting was for the purpose of discussing Petitioner's plea (A. 57). He further testified that the attorneys did discuss with Petitioner the possibility of his receiving the death penalty if he persisted

in his plea of not guilty (A. 61). It was his opinion that Judge Hatch would not have heard the case without a jury on a plea of not guilty (A. 62). This opinion was concurred in by Petitioner's attorney (A. 73). In fact, Judge Hatch apparently said on at least one occasion that he would not allow Petitioner to go to trial without a jury. (*Ibid.*)

Petitioner's attorney, Mr. Robert H. LaFollette, stated that Petitioner was told that, if he went before a jury, he would be subject to the death penalty (A. 65-66). Judge Hatch had reminded them on "at least three occasions" of the death penalty, and it was "written up" in the newspapers that the death penalty would apply in any case where there was injury to the victim (A. 66). In a kidnaping case, with an "allied charge of rape", Mr. LaFollette said "that is certainly the most serious injury that I can think of." (*Ibid.*) He advised Petitioner that he "couldn't go before a jury" because "it would be almost sure conviction and a possible death penalty" (A. 74-75). "Under all the circumstances", he told Petitioner, "I believe you should plead guilty" (A. 65). Mr. LaFollette "felt very gratified" when Petitioner decided to change his plea "in that we saved him from a death penalty in my opinion" (A. 66). On cross-examination he stated that "it looked [sic] very difficult for him [Petitioner] before a jury" and that he "certainly had a feeling that he [Petitioner] would be convicted beyond a shadow of a doubt" (A. 70). He told this to Petitioner "several times". (*Ibid.*) Mr. LaFollette's opinion of the case was summed up in his comment that he had "never had one [a case] where the defendants had tied themselves up in a sack like they had in this one" (A. 64).

In addition to the foregoing testimony, Mr. LaFollette further testified that the district judge, Judge Hatch, had made numerous comments, both in and out of the presence of the Petitioner, about the death penalty if the Petitioner went before a jury (A. 72). Judge Hatch stated, at one point, "in open court that he thought he [Petitioner] might get the death penalty", and "that . . . is enough to put a lawyer on notice" (A. 70). Mr. LaFollette said that the comment of the judge was "deleted out" of the record before the Petitioner pled guilty. (*Ibid.*) On an apparently earlier occasion, in chambers, when the attorneys went to Judge Hatch to ask for a date for a hearing because they "thought" they would change the plea, Judge Hatch said: "Well, I think you are very wise, because I was certainly going to submit the death penalty to the jury" (A. 72). He said this to counsel on occasions previous to that as well. (*Ibid.*) The witness stated that the judge made the further comment that: "It is very likely that they will get the death penalty." (*Ibid.*) Mr. LaFollette reported these comments of the judge to the Petitioner, and, from the context, it is clear that these reports were made to the Petitioner before the Petitioner actually changed his plea from not guilty to guilty. (*Ibid.*) In addition, in open court, Judge Hatch also told the Petitioner that if he went before a jury, the death penalty could be imposed (A. 23), and, prior to accepting a formal guilty plea, he told Petitioner that, on a guilty plea, the court alone could not impose the death penalty (A. 27). He suggested that there was some authority for empaneling a sentencing jury, but it was his decision, to "relieve your minds of any suspense —that the [death] penalty should not be imposed in your case, nor should a jury be empaneled. . . ." (A. 27-28).

After hearing the evidence and the arguments of counsel, the district court denied Petitioner's motion (A. 89-92). The district court found that the death penalty provision of 18 U.S.C., Sec. 1201(a), was constitutional, basing its decision upon the case of *Robinson* v. *United States,* 264 F.Supp. 146 (W.D. Ky. 1967). It concluded, in effect, that because the statute was constitutional, Petitioner's claim that the statute coerced him into pleading guilty did not have any merit (A. 90). Having rejected, as a matter of law, and based upon the conclusion that the death penalty provision of the Federal Kidnaping Act was not unconstitutional, the claim of the Petitioner that his plea of guilty was coerced by fear of the death penalty, the district court went on to hold that Petitioner pled guilty because of the confession which his co-defendant had made. (*Ibid.*) The district court also rejected Petitioner's motion on the other grounds stated therein. The opinion concluded with a general finding that there was "no coercion of any kind" upon the Petitioner (A. 92).

Thereafter, on April 8, 1968, this Court decided the case of *United States* v. *Jackson, supra,* in which the death penalty provision of 18 U.S.C., Sec. 1201(a), was held unconstitutional on the grounds that it *needlessly encouraged* guilty pleas, which resulted in discouraging assertion of the Fifth Amendment right not to plead guilty, and deterred the exercise of the Sixth Amendment right to demand a jury trial. On April 11, 1968, Petitioner filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit, from the order of the district court denying his motion (A. 94).

On December 17, 1968, the Court of Appeals for the Tenth Circuit affirmed the decision of the district court (A. 98-100). The Court of Appeals pointed out that, although

this Court had found the death penalty provision of 18 U.S.C., Sec. 1201, unconstitutional after the decision of the district court had been rendered, that decision "recognized that the presence of the proscribed provision did not imply that every guilty plea [entered thereunder] was involuntary" (A. 99). It then went on to state that the finding of the trial court that the guilty plea was induced not because of the statute, but by reason of other matters, was supported by substantial evidence in the record. (*Ibid.*)

Summary of Argument

I.

United States v. Jackson Should Have Retroactive Application to Federal Kidnaping Act Guilty Pleas Entered Prior to the Date of That Decision.

A. It Is Implicit From the Language of *Jackson* That It Should Be Applied Retroactively.

Jackson was based upon the rationale that the selective death penalty provision of the Federal Kidnaping Act discouraged the Fifth Amendment right not to plead guilty and deterred exercise of the Sixth Amendment right to demand a jury trial. Therefore, such provision could result in involuntary guilty pleas. Since future guilty pleas could be involuntary if the selective death penalty provision were allowed to remain in the Act, it follows that some guilty pleas to charges under the Act, entered prior to *Jackson,* could have been involuntary. This Court has always held that involuntary guilty pleas are subject to collateral attack, even after final judgment has been entered. Therefore, logic requires that *Jackson* be given retroactive application.

B. *United States v. Jackson* Was a Declaration of the Unconstitutionality of a Federal Criminal Statute, and the Doctrine of Absolute Retroactive Invalidity Should Apply to Insure Protection of Individual Rights.

Jackson involved a declaration of the invalidity of a federal criminal statute. Prior decisions of this Court involving both civil and criminal statutes have held that an unconstitutional statute is not a law. It is void and its unconstitutionality dates from the time of its enactment. When a criminal statute is declared unconstitutional, prior convictions under the statute are a nullity. The rule is called "absolute retroactive invalidity". The only exception to the rule applies to civil statutes declared invalid after property rights have vested and such exception is not applicable here.

In order to insure protection of the rights of individuals who pled guilty to kidnaping charges prior to *Jackson*, justice demands that the rule of absolute retroactive invalidity apply to the declaration of the unconstitutionality of the selective death penalty provision of the Federal Kidnaping Act. The fact that only a portion of the statute was declared unconstitutional and severed does not affect the analysis. That invalid portion of the statute tainted the whole statute and created a situation in which it is possible, if not probable, that persons charged under the Federal Kidnaping Act, prior to *Jackson*, were faced with an illegal and unconstitutional dilemma, i.e., whether to plead not guilty and risk a death sentence, or to avoid any possibility of the death sentence by pleading guilty. The doctrine of absolute retroactive invalidity should be applied to determine whether any persons charged under the Act prior to *Jackson* were faced with such a dilemma, and,

if so, whether the fear of the death penalty in any way motivated guilty pleas.

C. Even If the Recent Decisions of This Court on Criminal Law Enforcement Procedures Were Applicable on the Retroactivity of *United States v. Jackson*, Under Those Decisions *Jackson* Should Be Applied Retroactively.

If prior decisions of this Court dealing with the retroactive application of decisions involving criminal law enforcement procedures are applicable to this case, those decisions require that *Jackson* be applied retroactively. Those decisions hold that the standards to be applied to determine whether an opinion should be applied retroactively are:

(1) The purpose to be served by the new standards;

(2) The extent of the reliance by law enforcement authorities on the old standards; and,

(3) The effect on the administration of justice of a retroactive application of the new standards.

The most important of the above considerations is the purpose to be served by the new standards. If the purpose of a decision is to insure a fair trial and a reliable verdict, as opposed to simply requiring law enforcement officials to comply with the law or to insure protection of constitutional rights which are ancillary to the integrity of the fact-finding process or reliability of the verdict, then the decision will be given retroactive effect. In such cases, the other considerations enumerated above are given little weight.

The selective death penalty provision of the Federal Kidnaping Act did not merely result in denying an accused a fair trial, it denied him any trial at all. Furthermore, it forced him to forfeit his right to confront and cross-examine his accusers. The right to a trial and the right to confront and cross-examine accusers are so fundamental that this Court has, in the past, accorded cases involving these rights retroactive application. Therefore, the decision in *Jackson* should also be applied retroactively.

II.

The Test That Should Be Applied to Establish on a Collateral Attack That a Plea of Guilty Under the Federal Kidnaping Act, Made Prior to United States v. Jackson, Was Involuntary, Is Whether Fear of the Death Penalty Needlessly Encouraged the Plea.

Assuming that this Court does give *Jackson* retroactive application, the next step is to delineate a test to determine when guilty pleas prior to *Jackson* were involuntary because of the selective death penalty provision of the Federal Kidnaping Act. An obvious prerequisite would be that the death penalty must have been a possibility, which could be determined from the indictment itself. The indictment in the case involved would have to charge that the kidnap victim was "not liberated unharmed" in order to activate the death penalty provision.

Beyond the requirement that the death penalty be a possibility, the remainder of the litmus for involuntary guilty pleas is suggested in *Jackson* itself. The case indicates that a guilty plea under the Federal Kidnaping Act would have been involuntary if the selective death penalty provision "needlessly encouraged" the guilty plea.

The term "needlessly encouraged" suggests that the fear of the death penalty need not have been the only, or even the primary motivation for pleading guilty. If the evidence establishes that such fear was a definite factor in influencing a guilty plea, then it is clear that the defendant was faced with a choice which the Constitution forbade, and his guilty plea was involuntary.

III.

Petitioner's Plea of Guilty to a Charge Under the Federal Kidnaping Act Was Needlessly Encouraged by Fear of the Death Penalty, and, Under United States v. Jackson, That Plea Was Involuntary and Invalid.

In the instant case, the district court held that the Federal Kidnaping Act was constitutional in all respects and then went on to decide that the Petitioner pled guilty to the indictment for other reasons. Because of the incorrect conclusion of law on the constitutionality of the statute, the district court ignored the mass of evidence of the influence of the death penalty provision on Petitioner's guilty plea. Once the decision was made that the statute was constitutional, that evidence was not relevant or germane.

The United States Court of Appeals for the Tenth Circuit merely compounded the error of the district court. It refused to go back through the record to review the evidence on the influence of the death penalty provision on Petitioner, as it should have done, and held that the finding of the district court that Petitioner had pled guilty because of his co-defendant's confession was supported by substantial evidence. In effect, it adopted a rule that a plea of guilty to a charge under the Federal Kidnaping

Act prior to *Jackson* was not involuntary unless fear of the death penalty was the *only* reason for the plea.

However, if the test for determining whether Petitioner's guilty plea was voluntary is whether it was needlessly encouraged by the selective death penalty provision of the Federal Kidnaping Act, and if that test does not require that the fear be the only reason for pleading guilty, then the evidence in this record clearly establishes that Petitioner's guilty plea was involuntary under *Jackson*. The record is replete with evidence of the influence of the death penalty provision upon Petitioner. After his attorney investigated the case and after he had learned of his co-defendant's confession and desire to plead guilty, the chances of his being acquitted by a jury were apparently outweighed by the chances of his being convicted and receiving the death sentence. His mother, his attorney, the attorneys for his co-defendant, the newspapers and even the district judge emphasized the possibility of the Petitioner receiving the death penalty. His attorney felt that he would be convicted and would receive the death sentence "beyond a shadow of a doubt" and so advised the Petitioner. The attorney advised Petitioner to plead guilty "under all the circumstances" and "felt very gratified" when Petitioner had done so because he felt that he had "saved" Petitioner from a death sentence.

Based upon the uncontradicted evidence in the record from all witnesses, the fear of the death penalty was a factor, if not the primary factor, in influencing the Petitioner to plead guilty to the kidnaping charge against him, and, therefore, his guilty plea was involuntary and in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States.

ARGUMENT

I.

United States v. Jackson Should Have Retroactive Application to Federal Kidnaping Act Guilty Pleas Entered Prior to the Date of That Decision.

Petitioner was indicted, as stated heretofore, on January 27, 1959, for a violation of 70 Stat. 1043, 18 U.S.C. 1201. The indictment charged that the kidnap victim was "not liberated unharmed" (A. 13). On April 30, 1959, Petitioner withdrew his plea of not guilty, and he entered a plea of guilty, which was accepted by the district court (A. 26-28). Thus, the Petitioner's plea of guilty was entered, accepted and a judgment entered thereon considerably prior to this Court's decision in *United States* v. *Jackson,* 390 U.S. 570 (1968). Question has been raised as to the retroactive application of *Jackson* to guilty pleas entered and finalized prior to the effective date of that decision. See, Memorandum of the United States on Motion for Leave to Proceed *in Forma Pauperis* and on Motion for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, pp. 6-7. There is also an apparent conflict in the lower federal courts on the question of the retroactive application of *Jackson.* In *Pindell* v. *United States,* 296 F.Supp. 751 (D. Conn. 1969), and in *United States ex rel. Buttcher* v. *Yeager,* 288 F.Supp. 906 (D. N.J. 1968), it was held that *Jackson* was not to be given retroactive application. Conversely, *Alford* v. *North Carolina,* 405 F.2d 340 (4 Cir. 1968); *Natale* v. *United States,* 287 F.Supp. 96 (D. Ariz. 1968); and *McFarland* v. *United States,* 284 F.Supp. 969 (D. Md. 1968), all held that *Jackson* was to be applied

retroactively. In the instant case, the United States Court of Appeals for the Tenth Circuit also apparently believed that *Jackson* was to be applied retroactively, citing with approval the decision in *McFarland*. In view of this conflict in decisions in the lower federal courts, and in view of the fact that the United States has raised this as an issue in the instant case, the point is briefed herein. It is respectfully submitted that *Jackson* should be given retroactive application for one or more of the following reasons:

(1) It is implicit from the language of *Jackson* that it should be retroactive; or,

(2) *Jackson* declared a federal criminal statute unconstitutional, and the doctrine of absolute retroactive invalidity is applicable and requires retroactive application; or,

(3) Based upon recent opinions of this Court involving the question of retroactivity of other decisions, the constitutional defect pruned out of the Federal Kidnaping Act in *Jackson* went to the very fairness and integrity of the fact-finding process, and, therefore, the decision must be applied retroactively.

The bases for the foregoing conclusions will be discussed in detail hereinafter.

A. It Is Implicit From the Language of *Jackson* That It Should Be Applied Retroactively.

The rationale of *Jackson* was that the inevitable effect of the selective death penalty provision of the Federal Kidnaping Act was "to discourage assertion of the Fifth

Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." 390 U.S. at 581. It was said that:

> "Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." (*Id.* at 583.)

The decision points out that the "evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers, but simply that it needlessly *encourages* them" (emphasis in original) (*Ibid.*), although it was recognized that not "every defendant who enters a guilty plea to the charge under the Act does so involuntarily." (*Ibid.*)

The basis of the *Jackson* decision is, therefore, that the selective death penalty provision of the Federal Kidnaping Act could result in involuntary guilty pleas by Defendants electing to avoid any possibility of receiving the death penalty. If it is acknowledged that some guilty pleas *in futuro* could be involuntary if the selective death penalty provision had remained in the Federal Kidnaping Act, then it necessarily follows that some guilty pleas entered prior to *Jackson* could have also been involuntary because of that provision. Logic and justice demand, then, that *Jackson* be given retroactive effect to correct any such defective guilty pleas.

Since the defect of the Federal Kidnaping Act, prior to *Jackson,* was the potentiality for inducing involuntary pleas of guilty, it should automatically follow that *Jackson* be applied retroactively, because this Court has always held that involuntary pleas of guilty are void and of no

effect, and may be attacked collaterally, even after final judgment has been entered. *Machibroda* v. *United States,* 68 U.S. 487 (1962); *Shelton* v. *United States,* 356 U.S. 26 (1958); *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956); *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948); *Waley* v. *Johnston,* 316 U.S. 101 (1942); *Walker* v. *Johnston,* 312 U.S. 275 (1941). Petitioner's motion pursuant to 63 Stat. 105, 28 U.S.C. 2255, constituted a collateral attack upon his guilty plea, and, in said motion, he alleged, *inter alia,* that the plea was involuntary because of the death penalty provision in the Federal Kidnaping Act (A. 5). That allegation was sufficient to open the guilty plea to collateral attack under *Jackson,* and the other decisions of this Court cited above.

B. *United States v. Jackson* Was a Declaration of the Unconstitutionality of a Federal Criminal Statute, and the Doctrine of Absolute Retroactive Invalidity Should Apply to Insure Protection of Individual Rights.

An alternative reason in support of retroactive application of *Jackson* is that such decision constituted a declaration of the unconstitutionality of a federal criminal statute which had been in effect for almost thirty-five years. The potential for impairment of constitutional rights during that period of time by an unconstitutional criminal statute is so great that justice requires that the invalidating decision be given retroactive effect. This Court has held in the past that "an unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it carries no office; it is in legal contemplation as inoperative as though it had never been passed." *Norton* v. *Shelby County,* 118 U.S. 425 (1886).

Since an unconstitutional statute is not a law, it is wholly void and ineffective for any purpose. Its unconstitutionality dates from the time of its enactment and not merely from the decisions so branding it. *Chicago, I. & L. R.R.* v. *Hackett,* 228 U.S. 559 (1913); *Litle Rock & Ft. S. R.R.* v. *Worthen,* 120 U.S. 97 (1887).

Norton, Hackett and *Worthen* were all cases involving civil statutes, but the rationale should be even more apropos to a declaration of the unconstitutionality of a criminal statute. Their relevance is underscored by this Court's enunciation of the doctrine that if a person is convicted under an unconstitutional statute, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity. *Ex parte Royall,* 117 U.S. 241 (1886). An unconstitutional law is void, and is as no law. An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. *Ex parte Siebold,* 110 U.S. 371, 376 (1879). If a statute prescribing an offense is void, the court is without jurisdiction, and a person convicted under it is entitled to be discharged. *Ex parte Yarbrough,* 110 U.S. 651, 654 (1884). The foundation for the theory of absolute retroactive invalidity of an unconstitutional statute is discussed in some detail by this Court in *Linkletter* v. *Walker,* 381 U.S. 618, 622-25 (1965).

An exception to the rule of absolute retroactive invalidity of an unconstitutional statute has been carved out in later decisions of this Court, but this exception has applied only to the declaration of the invalidity of a civil statute. *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371 (1940). There, the Court recognized that: "The actual existence of a statute, prior to such

determination, is an operative fact and may have consequences which cannot be justly ignored." (*Id.* at 374.) It was held, therefore, that when there has been past reliance upon the invalid statute, and property rights have vested under it, the doctrine of absolute retroactive invalidity cannot be justified, and the decision will be prospective only. (*Ibid.*) It is submitted, however, that when a civil statute is involved, and there has been reliance and vesting of property rights, prospective and not retroactive application of the invalidating decision may be justified. But there are fundamentally different considerations demanding retroactive application where a criminal statute is declared invalid (despite the language of this Court contained in *Linkletter* v. *Walker, supra,* 381 U.S. at 627).

Therefore, when a federal criminal statute is declared unconstitutional, the doctrine of absolute retroactive invalidity should be applicable. The justification for this conclusion can be found in the policy which underlies the exception to the rule of absolute retroactive invalidity found in *Chicot County Drainage Dist., supra.* The dominant theme or policy of that exception is the protection of the rights of the individual. If that is the *raison d'etre* for divergent rulings on the retroactive application of decisions invalidating statutes, then, in order to implement that policy when a criminal statute is involved, the Court must adhere to the doctrine of absolute retroactive invalidity. Otherwise, we could have the intolerable situation of individuals being convicted of acts which might not be crimes, being punished therefor, and being given no means of redress in the courts.

The fact that this Court, in *Jackson,* only declared a portion of the Federal Kidnaping Act to be unconstitu-

tional should not change the analysis in any material respect. That portion of the statute declared unconstitutional (i.e., the selective death penalty provision) was an integral part of the statute. It was the worm in the apple and it spoiled the fruit. It resulted in the possibility—indeed, probability—of tainted, involuntary pleas of guilty. Even though it was held by this Court to be severable, 390 U.S. at 586, that surgery only excised the malignancy in the statute. It did not cure the prior effect of that malignancy. That effect can only be dealt with through retroactive application of *Jackson.*

The issue posed here is not the guilt or innocence of any particular defendant who pled guilty to a charge under the Federal Kidnaping Act prior to *Jackson;* the issue is whether some defendants may have been faced with a choice which could not, under the Constitution, have been properly required of them, and, if so, whether that improper choice influenced their pleas. If such conditions did exist prior to *Jackson,* then it is clear that we have a situation in which there are individuals in our prisons who are being punished under illegal and invalid guilty pleas. And, to go back to the point made under the prior subsection, this Court has always held that involuntary guilty pleas can be collaterally attacked. *Machibroda* v. *United States,* 368 U.S. 487 (1962). Therefore, because only a part of a statute, rather than an entire statute, was declared unconstitutional, does not prevent application of the doctrine of absolute retroactive invalidity, which, in turn, requires that the *Jackson* decision be applied retroactively.

In passing, it might be noted that there are a number of recent opinions of this Court involving the issue of retroactive application of other decisions. See, e.g., *Link-*

letter v. *Walker,* 381 U.S. 618 (1965), in which it was held that the decision in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), would be prospective only. These recent decisions will be discussed in detail in the immediately succeeding section of this brief, but, at this point, it should be noted that they are not germane to the foregoing analysis because all of them involve questions of criminal law enforcement procedures, not the declaration of the unconstitutionality of federal criminal statutes. In each of these cases, this Court, in effect, determined that an existing criminal law enforcement procedure was not to be utilized further, and, in some of them, the Court even outlined new procedures to be followed. See, e.g., *Miranda* v. *Arizona,* 381 U.S. 436 (1966). There is a fundamental distinction between holding a statute unconstitutional and holding that a criminal law enforcement procedure utilized in the past can no longer be followed. When a criminal statute is declared unconstitutional, it is void, *ab initio.* Each person convicted under it prior to such declaration was deprived of his constitutional rights. Each person convicted under it prior to such declaration was not guilty because he did not commit any crime. On the other hand, a criminal law enforcement procedure, even though invalid, is not a law. Its effect is really ancillary to the question of the guilt or innocence of the accused. It normally does not go to the question of the fairness of the trial itself or to the reliability of the verdict. Therefore, there is justification for treating a decision on the unconstitutionality of a criminal statute differently from a decision on the illegality of a criminal law enforcement procedure, when faced with the question of whether the decision should be retroactive or prospective only.

In summary, it is respectfully submitted that, under the doctrine of absolute retroactive invalidity, followed previously by this Court in cases involving criminal statutes, *Jackson* should be given retroactive application.

C. Even if the Recent Decisions of This Court on Criminal Law Enforcement Procedures Were Applicable on the Retroactivity of *United States* v. *Jackson*, Under Those Decisions *Jackson* Should Be Applied Retroactively.

As stated heretofore, there are a number of relatively recent opinions of this Court which have considered the question of retroactive application of other decisions affecting criminal law enforcement procedures. It is respectfully submitted that even if these decisions are authority on the question of the retroactive application of *Jackson*, they justify a conclusion that *Jackson* should be given retroactive application. The decisions referred to indicate that, where the purpose of a decision of this Court is to require law enforcement officials to comply with the provisions of the Constitution, or a federal law, the effect of such a decision will be prospective only, for any violation of constitutional rights by procedures previously followed by law enforcement officials seldom raises a serious question as to the validity of the decision of the jury on guilt or innocence, or deprives the accused of a fair trial. Where, however, the effect of the unconstitutional criminal law enforcement procedure casts substantial doubt on the correctness of the determination of the accused's guilt or innocence, or has effectively denied the accused a fair trial, the decision invalidating the procedure has been held to have retroactive application. The requirements of a fair

trial and a reliable verdict, then, have been held to transcend all other relevant considerations.

Thus, in a number of cases, this Court has held that decisions involving the actions of law enforcement officials would be prospective in application. The case of *Mapp* v. *Ohio,* 367 U.S. 643 (1961), held inadmissible at a trial of the accused any evidence obtained against him by an unreasonable search and seizure. In *Linkletter* v. *Walker,* 381 U.S. 618 (1965), the Court refused to apply *Mapp* retroactively, stating that the purpose of *Mapp* was as a deterrent to lawless police action. 381 U.S. at 636. It could not be said that this purpose would be advanced by making the rule retroactive. Misconduct of the police prior to *Mapp* had already occurred and would not be corrected by releasing the prisoners involved. It was noted that the decision only created a "procedural weapon that had no bearing on guilt. . . ." (*Id.* at 637). The aim and intention of *Mapp,* then, was to force law enforcement officials to respect an accused's right to be free from unreasonable searches and seizures by assuring that, in the future, no profit would be gained by violation of such right. Likewise, in *Fuller* v. *Alaska,* 393 U.S. 80 (1968), the Court refused to apply retroactively the rule of *Lee* v. *Florida,* 392 U.S. 378 (1968), which is that evidence obtained in violation of Section 605 of the Federal Communications Act, 48 Stat. 1964, 1103, 47 U.S.C. 605, is not admissible at trial. And, in *Desist* v. *United States,* 394 U.S. 244 (1969), the exclusionary rule of *Katz* v. *United States,* 389 U.S. 347 (1967), precluding from evidence the fruits of electronic eavesdropping without a search warrant, was held to be prospective only. The decisions in *Lee* and *Katz* were, as in *Mapp,* primarily intended to compel law enforcement officials to comply with the law.

Several other recent decisions have had the purpose of insuring protection of constitutional rights which are actually ancillary to the integrity of the fact-finding process or the reliability of the verdict, and these decisions have also been limited to prospective application. In *Johnson* v. *New Jersey,* 384 U.S. 719 (1966), it was held that *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), would not be applied retroactively. The primary purpose of *Miranda* and *Escobedo* was to guaranty full effectuation of the privilege against self-incrimination. *Johnson* followed the rationale of *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406 (1966), which had previously held that the rule of *Griffin* v. *California,* 380 U.S. 609 (1964), relating to the unconstitutionality of the prosecution commenting on the defendant's failure to testify at his trial, was to be prospective only. *Tehan* also dealt with the effectuation of the privilege against self-incrimination. The Court said that "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulders the entire load.' " 382 U.S. at 415. As in *Mapp,* the doctrine dealt with rested on different considerations than constitutional decisions that had been applied retroactively. The Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth at the trial, and, therefore, retroactive application was not required. (*Id.* at 416.)

Similarly in *Stovall* v. *Denno,* 388 U.S. 293 (1967), it was held that the decisions in *United States* v. *Wade,* 388 U.S.

218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), requiring counsel for the accused to be present during pre-trial confrontation of witnesses for identification purposes, were not to be retroactive. The reasoning in *Stovall* was that when the probabilities of the condemned practice affecting the integrity of the truth-determining process were weighed against prior reliance on the practice and the impact of retroactivity on the administration of justice, the "unusual force of the countervailing considerations" dictated a conclusion in favor of prospective application only. 388 U.S. at 298-99.

On the other hand, this Court has held, even in cases where the ultimate decision was for prospective application only, that where the principle involved "went to the fairness of the trial—to the very integrity of the fact-finding process", *Linkletter* v. *Walker*, *supra*, 381 U.S. at 639, then it would require retroactive application. "The basic purpose of the trial is the determination of truth", and the decision will be retroactive when the effect of a law enforcement procedure is to "impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *United States ex rel. Shott*, *supra*, 382 U.S. at 416. There must be such unfairness in the reliability of the fact-finding process as to deny the accused due process of law. *Stovall* v. *Denno*, *supra*, 388 U.S. at 299.

Thus, in a number of other cases wherein the procedure invalidated did affect the reliability and integrity of the fact-finding process, this Court has made its decisions retroactive. For example, *Jackson* v. *Denno*, 378 U.S. 368 (1964), which involved the right of an accused to effective exclusion of an involuntary confession at his trial, was

itself a collateral attack, and retroactivity was automatic. In *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), the right of an accused to counsel at his trial was held to be retroactive. Other rights which have been made retroactive include the right of an indigent defendant to have a transcript furnished by the state for his appeal; the right of confrontation and cross-examination of witnesses, as outlined in *Pointer* v. *Texas,* 380 U.S. 400 (1965), and *Barber* v. *Page,* 390 U.S. 719 (1968); the right to counsel on appeal; the right to counsel on a plea of guilty; the right to counsel at a hearing concerning revocation of probation and imposition of a deferred sentence; the right to have a co-defendant's inculpatory statements excluded from evidence; and, the right of a person accused of a capital crime not to have excluded from the jury all persons having conscientious qualms against the death penalty. See, *Burgett* v. *Texas,* 389 U.S. 109 (1967), and *Doughty* v. *Maxwell,* 376 U.S. 202 (1964) (right of counsel at trial); *Eskridge* v. *Washington Prison Board,* 357 U.S. 214 (1958), and *Brookhart* v. *Janis,* 384 U.S. 1 (1966) (confrontation and cross-examination of witnesses per *Pointer* v. *Texas, supra); Berger* v. *California,* 393 U.S. 314 (1969) (Confrontation and cross-examination per *Barber* v. *Page, supra); Smith* v. *Arizona,* 389 U.S. 10 (1967), and *Anders* v. *California,* 386 U.S. 738 (1967) (right to counsel on appeal); *Arsenault* v. *Massachusetts,* 393 U.S. 5 (1968) (right to counsel when guilty plea tendered); *McConnell* v. *Rhay,* 393 U.S. 2 (1968) (right to counsel at revocation of probation hearing); *Roberts* v. *Russell,* 392 U.S. 293 (1968) (exclusion of co-defendant's inculpatory statements); *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) (non-exclusion of jurors with qualms against capital punishment).

The factors to be given consideration in determining whether a decision on a question of criminal procedure is to be given retroactive effect were first enunciated in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), and are summarized as follows:

(a) The purpose to be served by the new standards;

(b) The extent of the reliance by law enforcement authorities on the old standards; and,

(c) The effect on the administration of justice of a retroactive application of the new standards. See also, *Stovall* v. *Denno, supra,* 388 U.S. at 297. The most important of these considerations is "the purpose to be served by the new constitutional rule." *Desist* v. *United States, supra,* 394 U.S. at 249. And, from the foregoing-cited cases, where the purpose to be served by the new constitutional rule is to insure a fair trial and a reliable verdict, then considerations of reliance on prior rules by law enforcement authorities and the effect of retroactivity on the administration of justice are given little weight.

In regard to the instant case, it is submitted that the cited decisions require that *Jackson* be applied retroactively. The effect of encouraging an accused person to plead guilty to avoid a possibility of the death penalty does not merely result in denying him a *fair trial,* but denies him *any trial* at all. Therefore, it is clear that the purpose underlying *Jackson* was to insure persons accused of crimes under the Federal Kidnaping Act a fair trial and a reliable verdict. The selective death penalty provision stricken from the Act by *Jackson* subverted that purpose, affected the fairness of the trial process in such

cases, and "infected" proceedings under the Act with a "clear danger of convicting the innocent." Since the purpose of *Jackson* was so obviously to fulfill the principles outlined in *Linkletter, Tehan* and *Stovall,* any claims of reliance upon the old standards by law enforcement authorities or an adverse effect upon the administration of justice by a retroactive application of *Jackson,* would deserve little weight, as this Court held in *Desist.* Morever, by yielding to the temptation of avoiding the death penalty by pleading guilty, the accused is forced to forfeit his right to confront and cross-examine his accusers, another right considered to be so fundamental that it has been given retroactive effect. *Brookhart* v. *Janis,* 384 U.S. 1 (1966); *Berger* v. *California,* 393 U.S. 314 (1969).

II.

The Test That Should Be Applied to Establish on a Collateral Attack That a Plea of Guilty Under the Federal Kidnaping Act, Made Prior to United States v. Jackson, Was Involuntary, Is Whether Fear of the Death Penalty Needlessly Encouraged the Plea.

Assuming that *Jackson* is to be given retroactive effect by this Court, the threshold question is what test will be applied on a collateral attack, to determine when a plea of guilty, made prior to *Jackson,* to a charge under the Federal Kidnaping Act, was involuntary, and, therefore, invalid. An obvious prerequisite would, of course, be that the death penalty was a possibility in the particular case being considered. The indictment in such a case would, then, have to charge, in the language of the statute, that the kidnap victim was "not liberated unharmed." Some

might suggest that a more stringent prerequisite, such as a requirement that the death penalty in the particular case under review be a "reasonable probability", but such a requisite would be unreasonable and unfair because it would require the court to indulge in speculation as to what a jury would have done had the accused pled not guilty in a particular case. It should suffice that the indictment charged the language necessary to invoke the death penalty because it can, and should, be presumed that, had the United States Attorney not had evidence to justify a request for the death penalty, then the indictment would not have contained the operative language.

Once the prerequisite that the death penalty have been a possibility is satisfied, what other evidence will suffice to demonstrate that a guilty plea to a charge of kidnaping was unconstitutionally influenced by the selective death penalty provision of the Act? It is submitted that the answer to that query and the test to be utilized is suggested in *Jackson* itself. In *Jackson* it was stated that:

> "... the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers, but simply that it needlessly *encourages* them." 390 U.S. at 583. (Emphasis in original.)

The operative words are "needlessly *encourages*". If fear of the death penalty provision in the Federal Kidnaping Act needlessly encouraged any defendant to plead guilty to a charge of kidnaping, then it follows that his plea was involuntary and invalid. *Webster* defines the word "encourage" as follows:

> "(1) to give courage to; to give confidence to; to inspire with courage, spirit or strength of mind; to em-

bolden; to animate; to incite; to inspirit; (2) to help; to give support to; to be favorable to; to foster."

Webster's New Twentieth Century Unabridged Dictionary, p. 598 (2 Ed. 1966). Synonymous are the words "inspire, urge, impel, stimulate, instigate, incite, promote, advance, forward." "Encourage" connotes an intention that fear of the death penalty simply be a factor or circumstance in influencing a plea of guilty. The word is certainly not as strong as "coerced", "caused", "compelled" or "motivated", which would connote an intention that fear of the death penalty be the only factor, or the primary factor, in influencing a plea of guilty.

As a consequence of the choice of language utilized in *Jackson,* it is submitted that if it can be said, based upon the evidence in the record, that the invocation of the death penalty was a possibility, based upon the charge in the indictment, and that the fear of the death penalty was *a definite factor* in the decision of an accused to plead guilty to a charge under the Federal Kidnaping Act, then such fear "needlessly encouraged" the guilty plea, and the plea was involuntary. Under this theory, the fear of the death penalty would not have to be the only factor, or even the primary factor, in the decision to plead guilty, so long as it was one of the factors which led to the decision.

Of those lower court cases which have previously held that *Jackson* is to be applied retroactively, two of them, *Alford* v. *North Carolina,* 405 F.2d 340 (4th Cir. 1968), and *McFarland* v. *United States,* 284 F.Supp. 969 (D. Md. 1968), have dealt with the question of the test to be applied in determining if a prior guilty plea was involuntary. In *McFarland,* the Court did not delineate a test, *per se,* but simply stated, at page 977 of the opinion:

"... the Jackson case should not be applied indiscriminately to strike out every judgment heretofore entered in a case where a defendant has entered a guilty plea; totality of the circumstances in each case should be considered to determine whether there was any denial of due process in the light of the development of the law. When the totality of the circumstances in the instant case is considered, the Court finds that the pleas which were entered by McFarland in the Maryland National Bank case were entered for several reasons. *The hope of minimizing the chances of a death sentence in the federal case was not the only reason for entering the pleas. Of at least equal importance was the belief of McFarland and his attorney Levin that if a life sentence could be obtained in the federal case, the prosecution and trial of the murder case in the criminal court of Baltimore, with a possible death sentence resulting therefrom, could probably be avoided.*" (Emphasis added.)

The language in *McFarland* indicates that the district court felt that the fear of the death penalty had to be the *only* reason for a plea of guilty in order to make a plea of guilty to a kidnaping charge involuntary under *Jackson*. *McFarland* is much too restrictive, however, and it ignores the plain and obvious meaning of *Jackson*. The district court there recognized that the plea of guilty was made with the hope of avoiding the death penalty. Therefore, the accused in that case was faced, by virtue of the rationale of *Jackson*, with a decision that "needlessly chilled the exercise of basic constitutional rights." 390 U.S. at 582. That "chilling" effect was unnecessary, and, therefore, excessive. It "needlessly encouraged" the guilty plea. The

fact that the accused may also have been influenced by the hope of avoiding a prosecution on another charge was immaterial and not a proper reason for refusal to vacate the guilty plea in *McFarland.*

The *Alford* decision is not as restrictive as *McFarland.* In that case, the United States Court of Appeals for the Fourth Circuit stated, at page 347 of the opinion:

> "Jackson, by defining what are the impermissible burdens of a statutory scheme like that of North Carolina must be read, however, to hold that a prisoner is entitled to relief if he can demonstrate that his plea was a product of those burdens—specifically, *that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty.*" (Emphasis added.)

Thus, in *Alford,* the test enunciated was that the "principal motivation" (which would not necessarily be the only motivation) in pleading guilty to a charge under a provision comparable to the death penalty provision in the Federal Kidnaping Act, be the fear of the death penalty. It is respectfully submitted that the *Alford* decision, while it is more in keeping than *McFarland* with the language of this Court in *Jackson,* nevertheless still goes beyond the plain requirements of that language and establishes a more stringent test than was indicated in *Jackson,* as well as in analogous decisions of other federal courts.

Perhaps the situation that is most closely analogous to the question posed here is that situation in which a confession is illegally and unconstitutionally coerced from an accused, and he thereafter pleads guilty to the charge to

which he has confessed. That fact situation has arisen on numerous occasions in the past, and the decisions thereon can give some guide as to the tests to be applied to the instant situation. In the circumstance of the coerced confession followed by a guilty plea, although the language of the courts is not consistent, it is submitted that no court has required that the coerced confession be the only factor in the plea of guilty before the plea will be held involuntary.

It has always been held that, if an accused has pled guilty to a charge after a confession has been illegally extracted from him, then the guilty plea may be collaterally attacked. *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956). With a case in that posture, the court hearing the evidence is in exactly the same position as a court hearing evidence on a plea of guilty under the Federal Kidnaping Act; i.e., it must determine whether the relationship between the coerced confession and the plea of guilty was such as to make the plea involuntary.

In *Knowles* v. *Gladden,* 378 F.2d 761, 766 (9th Cir. 1967), a case involving that issue, the court held that:

> "If the plea [of guilty] was induced by incriminating statements made involuntarily, the conviction cannot stand."

See also, *Wright* v. *Dickson,* 336 F.2d 878, 882 (9th Cir. 1964). In *Bell* v. *Alabama,* 267 F.2d 243, 246 (5th Cir. 1966), the court, in the same context, stated:

> "We turn first to the voluntariness of appellant's confession. . . . [T]he voluntariness of the confession is the critical issue, for the averments of the petition clearly indicate a causal relationship between the al-

legedly coerced confession and the subsequent plea of guilty. Of such cases, the Supreme Court has said, 'Our prior decisions have established that: (1) a conviction following trial or on a plea of guilty, based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause. . . .'"

In *Gladden* v. *Holland,* 366 F.2d 580, 583 (9th Cir. 1966), it was said that: "A conviction on a plea of guilty based on a confession extorted by mental coercion is invalid under the Due Process Clause of the Fourteenth Amendment. . . . The confession given by Holland having been determined to be of this nature, the problem is to determine whether the guilty plea was based thereon." In *Holland* the court went on to say, from the totality of the circumstances, it was apparent that the conditions which rendered the confession involuntary had not been substantially removed at the time he entered his plea of guilty.

And, another example is *Zachery* v. *Hale,* 286 F.Supp. 237 (M.D. Ala. 1968). In that case, the accused claimed that his plea of guilty was based, in part, upon the trial court's violation of due process in refusing to give him a hearing on his sanity, and, in part, upon an illegal confession that had been extracted from him. The court indicated that the accused was entitled to have his plea vacated on either of these grounds. On the question of the extracted confession, it stated, at page 240 of the opinion:

"The involuntariness of the confession is significant, even though Zachery upon the advice of his counsel withdrew his pleas of not guilty and not guilty by reason of insanity, and on May 29, 1961, entered a plea of guilty, since one of Zachery's court-appointed coun-

> sel, . . . testified before this court that the obtaining of the confession from Zachery was a factor that entered into his recommending to Zachery that he plead guilty. Therefore, we have one of Zachery's court-appointed counsel, as he was forced to do under the circumstances, give some consideration and weight to an illegal confession in recommending to Zachery that he enter a plea of guilty to the first degree murder charge. Thus, it is readily apparent that the plea of guilty that Zachery entered in the Circuit Court of Lee County, Alabama, on May 29, 1961, was not voluntary; to the contrary, it was in part forced by reason of the illegal confession that had been extracted from him by the authorities on May 19, 1961."

It is submitted that based upon the cited authorities, in the analogous situation of a plea of guilty following a coerced confession, the accused is not required to show that the only motivation, or even the primary motivation, for his plea of guilty was the unconstitutionally obtained confession. If he can show that the coerced confession "induced" the plea; or that the plea was "based" upon the confession, even if only in part; or, that there is a causal connection between the plea and the confession, then the plea will be held to be involuntary. But, see *Briley, Jr.* v. *Wilson,* 376 F.2d 802 (9th Cir. 1967) (where the court indicated that the guilty plea must be primarily motivated by a deprivation of a fundamental constitutional right before it will be involuntary). And, as is strongly suggested in *Zachery, supra,* the coerced confession need not necessarily be the only factor in influencing the decision.

Based upon the foregoing, then, the test for determining whether a guilty plea under the Federal Kidnaping Act

was involuntary, should be whether that plea was needlessly encouraged by the fear of the death penalty. "Needless encouragement" should be something less than "primary" or "sole" motivation, and the mere fact that other factors may have influenced a decision to plead guilty should not bar relief. A man's mind is not so compartmentalized that a decision can be based upon one factor only. Generally, it is in the nature of things that any decision made by a human being is influenced by numerous factors. In the instant case, the Petitioner admitted that the fear of the death penalty was not the only reason for his plea of guilty (A. 45), but it was one of his reasons, and, therefore, that was sufficient to constitute the "needless encouragement" necessary to make his plea involuntary.

III.

Petitioner's Plea of Guilty to a Charge Under the Federal Kidnaping Act Was Needlessly Encouraged by Fear of the Death Penalty, and, Under United States v. Jackson, That Plea Was Involuntary and Invalid.

Petitioner's plea of guilty was entered and accepted by the United States District Court for the District of New Mexico on April 30, 1959 (A. 26-28). His motion to vacate sentence was heard on March 20, 1968, and an order was entered denying the motion on March 27, 1968 (A. 36, 93). The district court found that the Federal Kidnaping Act was constitutional in all respects, and it therefore rejected all of the Petitioner's evidence on the influence of the death penalty provision on his plea of guilty. It is submitted that this evidence, in light of *Jackson,* was relevant and material; that it should have been considered by the district court; and, that it established that Petitioner's guilty

plea was needlessly encouraged by fear of the death penalty, and was, therefore, involuntary.

After hearing all of the evidence in the case, the district court found:

> "It does not appear to me that the statute is unconstitutional, and I so hold. It has been before the courts on many occasions, although the precise point raised here has probably not been raised except in the Timbers case. However, this Court respectfully differs with Judge Timbers about this matter.
>
> "The question has been raised that the petitioner was coerced into pleading guilty because he was afraid to ask for a jury trial and take the chances on getting a death sentence. Some question has been raised about the acts of Judge Hatch in this regard. After hearing the evidence, the Court was of the opinion, and now finds, that the petitioner decided to plead guilty when he learned that his co-defendant was going to plead guilty, and that his determination had nothing to do whatsoever with anything that Judge Hatch said, or with what his attorneys might have said. The Court finds that the petitioner knew all about the confession given by his co-defendant. . . . The Court further finds that the plea of guilty was made by the petitioner by reason of other matters, and not by reason of the statute, nor by reason of any acts or (sic) conduct of Judge Hatch. It is the conclusion of the Court that the statute is constitutional and that the proceedings before Judge Hatch are constitutional" (A. 90).

In concluding, the district court stated:

"The Court concludes that the statute in question is constitutional and that the plea was voluntarily and knowingly made" (A. 92).

It is obvious that the conclusion of the district court that the statute did not improperly influence Petitioner's plea had to be based upon the decision that the Federal Kidnaping Act was constitutional. Having reached the decision that the statute was constitutional in all respects, the determination that it did not improperly influence the guilty plea logically followed. With the issue of the effect of the statute thus disposed of, the district court then rejected Petitioner's other contentions and concluded that Petitioner's plea of guilty was influenced by his co-defendant's confession (A. 90). It may be, indeed, that the plea of guilty was influenced to some extent by what Petitioner's co-defendant did, but the incorrect decision of the district court on the constitutionality of the statute had the effect of ignoring the mass of evidence in the record from all of the witnesses, the Petitioner himself, his co-defendant, his mother, and the attorneys involved, that fear of the death penalty was a significant and definite factor in causing him to plead guilty.

The Court of Appeals for the Tenth Circuit, on appeal, also ignored the mass of evidence on the influence of the death penalty provision, and simply held that the district court's finding that Petitioner's guilty plea was influenced by the co-defendant's confession was supported by substantial evidence in the record. It did not attempt to go back through the record, as it should have done, and review the evidence again, in the light of *Jackson,* to consider the testimony relating to the effect of the death

penalty provision on Petitioner's guilty plea. Because of this failure, the Court of Appeals merely compounded the error of law of the district court.

However, if *Jackson* is to be applied retroactively, and if the test to be utilized to determine voluntariness of a prior plea of guilty under the Federal Kidnaping Act is whether the fear of the death penalty was a factor needlessly encouraging the guilty plea, as argued hereinbefore, then the Petitioner is entitled to a full and fair consideration of the evidence in the record on the influence of the death penalty provision, free from the debilitating effect of the district court's incorrect conclusion of law.

It is respectfully submitted that there is substantial evidence in the record, not only from the Petitioner himself, but from all of the other witnesses who testified, that fear of the death penalty not only needlessly encouraged his guilty plea, but such fear was, in fact, a definite, substantial and even significant factor in motivating him to so plead.

The evidence in the record clearly demonstrates that, from January to April, 1959, a number of events culminated in inducing Petitioner, against his desire and belief in his innocence, to withdraw his not guilty plea and enter a plea of guilty to the kidnaping indictment. These events bore on the influence of a possible death sentence. First, Petitioner was immediately made aware that he was facing a possible death sentence when he went before the district court for arraignment on January 28, 1959. At that time, the trial court stated:

> "The offense charged in this indictment is that of kidnaping and also provides that the person alleged to

have been kidnaped was not returned unharmed, which would make it possible, under the provisions of the law, *if the jury so determined and you were found guilty, that the death sentence could be imposed.*" (Emphasis added.) (A. 23).

While he was incarcerated between that time and the date of his change of plea, it was written up in the local newspapers that if he was tried by a jury, the maximum possible sentence that the Petitioner could receive was the death penalty (A. 48-49). However, at least up until the time that he learned that his co-defendant, Tafoya, had confessed, he resolved to persist in his plea of not guilty and to have his case tried to a jury (A. 40-42). Up until that time he felt that he would be found innocent by a jury (A. 49). He learned of his co-defendant's plea when his mother went down to the Albuquerque City Jail to see him (A. 47-48). She was not permitted to visit him at the time, because it was not during visiting hours (A. 38). She went around to the back of the jail and testified:

"... Then there was somebody, some fellow up there that yelled, 'Is there a Brady here?' So then Brady came to the window. It was upstairs. I don't know how many floors. Brady came to the window and he said, 'Mom, what are you doing? You are going to get yourself in trouble,' and I just said, 'For God's sake, plead guilty. They are going to give you the death sentence' " (A. 38).

Certainly, up until the time that he learned of his co-defendant's confession, Petitioner had to have weighed the chances of acquittal against the possible imposition of the death penalty because he was definitely made aware of that

possibility. The confession of his co-defendant apparently, however, changed his thinking on the chances of his being acquitted if he went before a jury. He did not actually see the confession until he met with his co-defendant and the three attorneys, Messrs. LaFollette, Espinosa and Chavez, some time in April (A. 43). Mr. Espinosa testified that the purpose of that meeting was to discuss the Petitioner's plea. He stated:

> "Q. What the nature of that conversation?
>
> "A. Most of the conversation was had between Mr. LaFollette and Brady. At that time, as I understood, Tafoya had informed Chavez that he was ready to change his plea; that he was going to enter a plea of guilty. The conversation that was had with Brady and Tafoya when I and LaFollette were present at the Federal Building was concerning the plea that Brady would enter. Tafoya had agreed to—or I won't say agreed. He had made up his mind and informed us that he was ready to plead guilty" (A. 57).

Petitioner testified that he thought that the meeting was for the purpose of discussing the manner of presentation of his defense (A. 43). However, he was shown a copy of Tafoya's confession and "from this moment on, every effort was made to induce . . . [him] to plead guilty." (*Ibid.*) His version of the conversation was as follows:

> "Q. Did your—did any of the attorneys present at that meeting indicate that you should change your plea prior to the time they handed you the statement?
>
> "A. No. No one did.
>
> "Q. Nothing then was said to discourage your plea?
>
> "A. Not until after the statement was handed to me.

"Q. All right. Who handed you the statement?

"A. I would think that Mr. Espinosa handed me the statement. I believe, to the best of my ability, Mr. Espinosa.

"Q. When he handed you the statement, did he say anything to you?

"A. Yes, he did. He said, 'How do you expect to fight this case with this statement that is going to be used against you?'

"Q. Are those his exact words to the best of your recollection?

"A. To the best of my recollection.

"Q. What did you do then?

"A. I read the statement and I felt pretty bad about it.

"Q. What do you mean you felt bad about it?

"A. Well, I felt bad about what was said in the statement because the statement was not accurate. The statement was a lie.

"Q. Did the statement tend to incriminate you?

"A. Definitely.

"Q. Did you have at that time any feeling with regard to the plea that you would enter after you had read the statement?

"A. Well, after I was spoken to, yes. After I was told that there was no defense, that all I could do was plead guilty, then I had no choice but to plead guilty" (A. 43-44).

Petitioner further testified that his own attorney, Mr. LaFollette, told him at that time that if he went to trial before a jury, "there was a great possibility . . . that . . .

[he] would be given the death sentence" (A. 44). He said that that influenced his decision as follows:

> " . . . Well, up to this period of time, I thought that Alfonso Tafoya and I were both pleading not guilty. At this time, I thought, well, if Alfonso Tafoya and I both pled not guilty and he testified on this, I thought I had a chance, but due to the fact when I seen he was going to plead guilty—at this time, also, Alfonso stated to me that he would testify for me. But, it just seemed very difficult for me to believe that any jury would believe Alfonso Tafoya testifying to me that I was not guilty when he in fact had pled guilty to this crime. So, I just couldn't grasp the situation quite right, you know" (A. 45).

Petitioner's co-defendant confirmed that the death penalty was discussed and emphasized by the attorneys at this meeting which was held to discuss Petitioner's plea (A. 54, 55-56).

The role played by the attorneys in this drama cannot be given enough emphasis. They advised Petitioner that he faced a death penalty and that, based upon the evidence they believed the Government would present at a trial, there was a definite probability that the Petitioner would be found guilty and the death penalty imposed. Mr. LaFollette testified at Petitioner's hearing on the motion to vacate sentence as Petitioner's attorney in 1959 (A. 63). His testimony conflicted in certain respects with the testimony of the Petitioner, but it did not conflict in the emphasis that was placed by everyone involved on the possibility of Petitioner being given the death penalty (A. 65-66, 70-71, 74-75). The transcript of his testimony is replete

with references evidencing his concern with the death penalty in 1959. His testimony was as follows:

> "Q. Did you ever discuss with Mr. Brady what his sentence might be?
>
> "A. What his sentence might be?
>
> "Q. If he would plead guilty?
>
> "A. Yes. We told him that under the statute, where they had any way injured the party allegedly kidnaped, that they would be subject to the death penalty, and I really didn't have to tell him that because Judge Hatch reminded us of it on at least three occasions, and it was written in the press where the death penalty was discussed, and the death penalty would apply in any case where there was injury to the person. Of course, with an allied charge of rape, that is certainly the most serious injury that I can think of" (A. 65-66).

At another place, he further testified:

> "Q. What did you tell Mr. Brady the maximum sentence was?
>
> "A. Well, I believe it was fifty years. That's my best recollection. If he didn't, if he pled guilty, because I didn't take any part in the Tafoya operation by which he changed his plea. I only learned that from Mr. Espinosa verbally and through a letter from Judge Chavez, and I naturally had told him he could get the death penalty, and so I felt very gratified when he decided to change his plea in that we saved him from a death penalty in my opinion" (A. 66).

And, at another point in the direct examination, he testified:

"Q. (Mr. McCarty continuing) You did after conducting your investigation and making yourself aware of the facts of the case to the extent you could, and after discussing the matter with your client, you were satisfied personally that it was a proper plea at that time?

"A. I don't believe I ever had a case where I had to do it. There would have been no chance before a jury and I can give some of the facts if the Court would like to know how impossible it was to take him before a jury with this case" (A. 68).

On cross-examination, also in the context of his recommending that Petitioner plead guilty, Mr. LaFollette testified:

"Q. Had you made up your mind at that time that he was guilty?

"A. Well, a lawyer doesn't necessarily make up his mind at any time. We never know for sure even after it is all over, but I had very good evidence against him in the file that had been furnished for my investigation that made it look very difficult for him before a jury.

"I certainly had a feeling that he would be convicted beyond a shadow of a doubt" (A. 70).

Mr. LaFollette repeated to Petitioner "several times" that he thought he "would be convicted beyond a shadow of a doubt" (A. 70).

One of the other attorneys involved, Mr. Gilberto Espinosa, testified and confirmed that the death penalty was discussed with Petitioner and that such penalty was a possibility if he persisted in his plea of not guilty (A. 61).

It is submitted that another significant factor that is apparent from the testimony is the role played by the district court in emphasizing the death penalty. Even after arraignment, Judge Hatch made, according to the attorneys, comments about the death penalty on several occasions. Mr. LaFollette testified:

"Q. Did you tell him that if he went before a jury, he would certainly get the death penalty?

"A. No. I told him though, that we were afraid he would and therefore Judge Hatch had expressed in open court that he thought he might get the death penalty, and I think that is enough to put a lawyer on notice.

"Q. Did Judge Chavez (sic) say this either before or at the time of or after he pled guilty?

"A. Oh, any conversation about the death penalty was prior to the sentencing, because that was deleted out before we pled guilty to it.

"Q. When did this conversation take place with Judge Hatch?

"A. Which one, now?

"Q. The one when Judge Hatch said there was a possibility of the death penalty?

"A. Well, he said that at the time of arraignment. If I am not mistaken, he said that—if I am not mistaken—he also admitted that at the time that we went to him and told him that we had decided to change our plea, and he said, 'Well, I think you are wise because there is—I would certainly recommend, submit the question of the death penalty to a jury.'

"Q. Then, as I understand it, you actually had a meeting in chambers with Judge Hatch?

"A. And the U. S. Attorney.

"Q. Before thy (sic) plea was ever changed?

"A. Yes.

"Q. What else took place at this meeting?

"A. Well, I believe it was for the purpose of changing the plea.

"Q. Who else was present besides yourself and Judge Hatch?

"A. Mr. Espinosa and I and Judge Hatch and the young U. S. Attorney, if I am not mistaken.

"Q. Was Judge Chavez there by any chance?

"A. No, I don't believe he was. He might have been. Now, we had several conferences with the court.

"Q. And then after this meeting, did you go back and tell Robert Brady that Judge Hatch thought if he went before a jury, he would get a death penalty?

"A. No, but I told him, thought, I thought he had a good chance of getting it and I still think that that was good advice.

"Q. You never mentioned that conversation with Judge Hatch?

"A. Never mentioned to him what Judge Hatch had said?

"Q. Yes.

"A. It was in the paper, and he was present in the hearings when he mentioned it.

"Q. Well, maybe I misunderstood, but I thought you had gone into Judge Hatch's chambers and that Judge Hatch had told you that he thought Mr. Brady would get the death penalty?

"A. He told counsel. I guess Brady wasn't present. When we went in and told him that we thought we

would change the plea, he said, 'Well, I think you are very wise, because I was certainly going to submit the death penalty to the jury', and he had told us that previously, too.

"Q. And didn't you also indicate to me a little bit earlier that Judge Hatch said he thought the jury would recommend a death penalty?

"A. No. He said, 'It is very likely that they will get the death penalty.'

"Q. Now, did you report this conversation to Robert Brady?

"A. Well, I certainly did" (A. 70-72).

Later on, in open court, prior to accepting a guilty plea from Petitioner, Judge Hatch made the following statements:

"The Court: Before I enter the formal plea of guilty for these defendants, I want to make them a certain explanation which I am sure your attorneys have fully advised you of, but which I want to be certain each defendant understands. In a case of this kind, the indictment charges what could be a capital offense—that is, that the death sentence could be imposed. That sentence can only be imposed, however, where a jury recommends the imposition of the death penalty. On a plea of guilty, such as your attorneys announce you desire to enter, the Court alone cannot impose the death penalty. I could impose sentence anywhere up to life imprisonment. Do you understand that?

"Defendant Brady: Yes, sir.

"Defendant Tafoya: Yes, sir.

• • • • •

"The Court: There is some authority, respectable authority, to the effect that on a plea of this kind, the Court might possibly empanel a jury and submit the question of whether the death penalty should be imposed. That is hardly a practical matter, as I view it now for this reason: In order for a jury to pass intelligently, if such power exists, I would think a jury would have to be advised and have evidence as to all of the facts in the case, not just pass on the plea of guilty entered, because jurors are conscientious. They wouldn't want to say the death penalty should be imposed or should not be imposed unless a full trial was had before a jury. I am not inclined at all to follow that procedure. In what appears to be the present, uncertain state of the law, I am inclined to think—and to relieve your minds of any suspense—that the penalty should not be imposed in your case, nor should a jury be empaneled, but you would be sentenced to a sentence that could be for life imprisonment. I want to be sure that you understand that" (A. 27-28).

"Under all of the circumstances", Mr. LaFollette told Petitioner, "I believe you should plead guilty" (A. 65). Mr. LaFollette "felt very gratified" when Petitioner agreed to change his plea to guilty and that "we saved him from the death penalty in my opinion" (A. 66). This comment upon the influence and advice of the attorneys in 1959 is not in criticism of them. They were competent attorneys and experienced in handling criminal matters (A. 56-57, 63-64). They assessed the evidence against Petitioner, weighed his chances before a jury, and decided that the risk of the death penalty was too great. Therefore, they advised Petitioner to plead guilty. They did not do any-

thing wrong. In the light of the selective death penalty provision in the Federal Kidnaping Act, they knew that they could save Petitioner's life by having him plead guilty, and this is what they recommended. But this is precisely the evil that this Court condemned in *Jackson*. This is exactly the consideration that an accused should not have been forced to weigh. Therefore, simply on the basis of the testimony of the attorneys, the obvious conclusion must be that the fear of the death penalty "needlessly encouraged" Petitioner's guilty plea. The importance of the advice of attorneys in these matters is underlined in *Zachery v. Hale*, 286 F.Supp. 237 (M.D. Ala. 1968).

Petitioner himself stated that he decided to plead guilty because of his "attorney, statements by Alfonso Tafoya, *the great risk of the death sentence.*" (Emphasis added.) (A. 45). He was frank to admit that a number of factors influenced his decision. The district court, after the hearing on the motion to vacate sentence, chose to ignore that evidence and to conclude that the Petitioner pled guilty because of his co-defendant's confession (A. 90). That finding has been commented on earlier, but it should be pointed out here that said finding is not at all inconsistent with the claim that fear of the death penalty influenced the decision to plead guilty. To the contrary, the finding is perfectly consistent with the effect of the selective death penalty provision. Petitioner intended to persist in his plea of not guilty and to have his case tried before a jury until he was apprised by his attorneys of the evidence against him and had learned of his co-defendant's confession. At that point, based upon the advice of his attorneys, the probability of conviction and the risk of the death sentence was a motivating factor in causing Petitioner's guilty plea.

A counter-argument might be made that had Petitioner believed that he was really innocent, and desired to have his case tried without running the risk of a death penalty, he could have pled not guilty and elected to go to trial without a jury. However, such an argument has little merit. In the first place, an accused cannot go to trial without a jury in the absence of consent of the prosecution, and there was never any evidence that the prosecution would have so consented. In fact, the language in the indictment that the kidnap victim was "not liberated unharmed" indicates that the prosecution intended to ask for the death penalty and would not have consented to a trial without a jury. In addition, the district court must agree to hear the case without a jury, and the attorneys both testified that they were convinced that Judge Hatch would not have heard the case without a jury (A. 62, 73). Judge Hatch even said this himself (A. 73).

In conclusion, therefore, based upon the evidence introduced at the hearing on Petitioner's motion, it is clear that the possibility of the Petitioner receiving the death penalty if he went before a jury was uppermost in the minds of everyone involved. That possibility was so important as to induce the attorneys to advise Petitioner to plead guilty. Petitioner himself testified that fear of the death penalty was a reason for pleading guilty. There is absolutely no contradictory evidence of any kind, from any witness, on the role that the death penalty played in the decision to plead guilty. Based upon the law enunciated in *Jackson*, that influence of the death penalty was unconstitutional and improper. It "needlessly encouraged" Petitioner's guilty plea; it "chilled" the exercise of his basic constitutional rights; and, for these reasons, the guilty plea should be vacated.

Conclusion

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the order of the United States District Court for the District of New Mexico, should be reversed, and the case remanded with instructions to grant the Petitioner's motion.

Respectfully submitted,

PETER J. ADANG,
Counsel for Petitioner Court-appointed by the United States Supreme Court; not a member of the Bar of the Supreme Court of the United States

800 Public Service Building
Post Office Box 2168
Albuquerque, New Mexico 87103
Telephone: (505) 243-4511

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 270

ROBERT M. BRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 98–100) is reported at 404 F. 2d 601. The memorandum opinion of the district court (A. 89–92) is not reported.

JURISDICTION

The judgment of the court of appeals (A. 101) was entered on December 17, 1968. On March 13, 1969, Mr. Justice White extended the time for the filing of a petition for a writ of certiorari to and including April 16, 1969, and the petition was filed on that date. The petition was granted on June 23, 1969 (A. 102; 395 U.S. 976). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court's finding in *United States* v. *Jackson*, 390 U.S. 570, that the death penalty provision of the Federal Kidnapping Act "needlessly encouraged" guilty pleas and jury waivers requires the setting aside of a pre-*Jackson* guilty plea which, under traditional standards for determining the voluntariness of a guilty plea, was voluntarily entered.

STATEMENT

In January 1959, petitioner, together with Alfonso Pedro Tafoya, was charged by a one-count indictment filed in the United States District Court for the District of New Mexico with kidnapping one Barbara Ann Steger for the purpose of rape, transporting her in interstate commerce from Albuquerque, New Mexico, to El Paso, Texas, and not liberating her unharmed (A. 13).

1. Both defendants were originally represented by Robert Hoath LaFollette and Gilberto Espinosa (A. 24). Mr. LaFollette had thirty years of experience in criminal law and had represented many capital defendants (A. 63–64). Mr. Espinosa, who had been in practice since 1921, had been an assistant United States attorney for fourteen years, and had also defended hundreds of criminal cases (A. 56–57). Both attorneys appeared at arraignment, where the defendants pleaded not guilty (A. 23–25).

Thereafter, Mr. LaFollette, who was retained by petitioner's family (A. 63), assumed the major burden of his defense, while Tafoya retained David Chavez, Jr., formerly a United States District Judge for

Puerto Rico (A. 5, 11, 83); subsequent to his representation of Tafoya, Mr. Chavez was appointed Chief Justice of the Supreme Court of New Mexico (A. 77). Mr. Espinosa assisted both counsel.

On April 30, 1959, in the presence of their attorneys, both defendants changed their pleas to guilty. Mr. Espinosa represented to the court that petitioner understood the contents of the indictment and was pleading guilty voluntarily and with full understanding of the situation (A. 27). The court then addressed the defendants personally, inquiring whether they understood that a death penalty could be imposed only if a jury so recommended, but that in the absence of a jury they could receive sentences up to life imprisonment. The court further inquired whether any promises had been made to them by anybody in regard to length of sentence. Both defendants acknowledged that they were aware of the possible sentences and that no promises had been made (*ibid.*). The judge then stated that, while there was authority for empaneling a jury to consider whether death sentences should be imposed, he did not approve of the procedure and was of the opinion that capital punishment was not appropriate in their cases (A. 27–28). Each defendant was then asked separately if he was guilty or not guilty, and each stated that he was guilty (A. 28).

On May 8, 1959, both defendants were sentenced to fifty years' imprisonment (A. 32), which was thereafter reduced to thirty years. Before imposing sentence, the court, noting a statement which petitioner had made to the probation officer, asked him if he

wished to withdraw his guilty plea and plead not guilty (A. 29). Petitioner replied that he desired to "let the plea stand," and acknowledged that in doing so he was admitting and confessing the truth of the charge and was pleading guilty voluntarily, without persuasion or coercion of any kind (A. 29–30).

2. On September 20, 1967, petitioner filed a motion in the district court pursuant to 28 U.S.C. 2255, alleging that his guilty plea had been coerced by (1) fear of the death penalty, (2) the importuning of counsel, and (3) the promise of executive clemency to be procured by the political efforts of Judge Chavez and his brother, Senator Chavez, both of whom were relatives of Tafoya (A. 4–5).[1] An evidentiary hearing was held on this motion. Testifying in his own behalf, petitioner asserted that he was not guilty and had never considered himself guilty of the offense (A. 46), that he had informed his counsel that he was not guilty (A. 40), that his original intent was to plead not guilty (A. 39), that he believed that he would be acquitted (A. 42), and that he did not believe that he was guilty when he changed his plea (A. 45). He claimed that his decision to plead guilty came at a conference among all defendants and counsel on the day that the plea was entered, when he was shown Tafoya's confession which implicated him (A. 44); he said that, prior to that time, he had no knowledge

[1] He also alleged that the trial court, in accepting his plea, failed to comply fully with the requirements of Rule 11, F. R. Crim. P. (A. 5–6), but this claim was never pressed.

that Tafoya had confessed (A. 39–40, 47).[2] At that conference, he asserted, "every effort was made to induce me to plead guilty" (A. 43). He said that Mr. Espinosa asked him how he expected to be acquitted when the confession would be used against him, and that Mr. LaFollette told him that if he went to trial there was a great possibility that he would get the death sentence (A. 44). Since he was depending upon Tafoya to testify for him, he concluded that the latter, who he heard intended to plead guilty, would lack credibility as a witness on his behalf (A. 45).[3] In sum, petitioner claimed that his plea was motivated by "[m]y attorneys, statements by Alfonso Tafoya, [and] the great risk of the death sentence" (*ibid.*).

Mr. LaFollette testified that, at their first conference in January, petitioner was "obdurate" in his wish to go to trial. The attorney made no suggestions to the contrary, since the possibility of legal and factual defenses remained to be investigated (A. 67). Thereafter, he went to El Paso to interview potential witnesses suggested by petitioner and "did a great deal of briefing involving the question of the Tafoya confession" (A. 64). The United States Attorney's

[2] Tafoya, however, testified at the hearing that he informed petitioner of his confession the first night that they both were in jail (A. 55). Mr. LaFollette testified that he received a copy of Tafoya's confession from petitioner at their first conference, the night after petitioner's arrest (A. 69). The court specifically found that petitioner had known about the confession shortly after it was given (A. 91).

[3] Although petitioner thus implied that he had no knowledge, prior to the conference, that Tafoya intended to plead guilty, he stated on cross-examination that he learned from his mother of Tafoya's intention ten days previously (A. 47–48).

office showed him the statements of prospective government witnesses, several of which he found to be very damaging (A. 64–65). He concluded that the Tafoya confession was accurate and not coerced, but he determined—and so informed petitioner—that it could not be used against him (A. 72–74). When he was informed by Judge Chavez that Tafoya would plead guilty, however, he concluded that there was no choice but for petitioner to do the same (A. 65, 69). The guilty plea would free Tafoya to be a government witness, and Mr. LaFollette concluded that he would make a very credible and damaging witness (A. 67–68). The evidence which the attorney knew to be available to the government was such that, as he informed petitioner several times, conviction was almost certain (A. 70, 75). The court had let it be known that he would not agree to a bench trial (A. 73). In light of the total circumstances of the case, he concluded that a capital recommendation by the jury, while not a certainty, was a distinct possibility (A. 70, 71, 75).[4] Before he could advise petitioner to plead guilty, however, the latter—who had also heard that Tafoya intended to change his plea—stated that he wished to enter a guilty plea (A. 65, 68, 70).

3. At the conclusion of the Section 2255 hearing, the court held that petitioner's plea "was voluntarily

[4] The court, when informed that defendants wished to change their pleas, commented that the decision was wise, since the question of the death penalty would have been submitted to the jury and a capital recommendation was likely (A. 71, 72). The testimony of Mr. LaFollette is unclear, however, as to whether, except at arraignment (see A. 23), the court had ever mentioned the possibility of capital punishment prior to being informed of the change of plea.

given without any duress, without any threats, without any promises, or without anything" (A. 76). Thereafter, in a memorandum decision and order filed one week after the hearing, the court considered the district court's decision in *United States* v. *Jackson,* 262 F. Supp. 716 (D. Conn.) (which was then pending on appeal to this Court) and held that the Kidnapping Act was constitutional but that, in any event, the guilty plea was tendered "by reason of other matters and not by reason of the statute" (A. 90). The court specifically found that petitioner was motivated to plead guilty by knowledge that his co-defendant intended to do so (*ibid.*). It found that Mr. LaFollette had rendered effective assistance to petitioner, and that, while the attorney had concluded that a guilty plea was the best course of action, petitioner had independently arrived at that decision (A. 91). It further found that no representations had been made to petitioner in regard to sentence or clemency (A. 92), that no comments by the district judge who accepted his plea were relayed to him before he decided to change his plea to guilty (A. 91), and that no pressures were put upon him by his attorney or anyone else to plead guilty (*ibid.*). The court thus concluded that the plea was "voluntarily and knowingly made," and was not induced by "any promise, representation, or coercion whatsoever" (A. 92).

The court of appeals, which rendered its decision subsequent to this Court's decision in *United States* v. *Jackson,* 390 U.S. 570, held that "[t]he finding of the trial court that the guilty plea was not made because of the statute but because of other matters is

supported by substantial evidence and is binding upon us" (A. 99). Determining that the district court's other findings were also supported by the evidence (A. 99–100), it concluded that "[w]e are convinced that the appellant voluntarily pleaded guilty" (A. 99).

ARGUMENT

SUMMARY AND INTRODUCTION

The basic problem posed by this case is the effect, if any, of this Court's decision in *United States* v. *Jackson,* 390 U.S. 570, on the validity of a conviction entered prior to *Jackson* on the defendant's plea of guilty to a capital charge under the Federal Kidnapping Act.

The Court in *Jackson* held the capital punishment provision of the Federal Kidnapping Act unconstitutional, finding that it imposed "an impermissible burden upon the assertion of [the] constitutional right" to a jury trial. For Jackson, who had not yet pleaded to the indictment, and future defendants prosecuted under the kidnapping law, this decision meant that a trial before a jury could not result in a sentence of death. There is no doubt that this right is equally applicable to previously convicted defendants who were made to suffer the "impermissible burden"—*i.e.,* any defendant under sentence of death is entitled to be resentenced.[5] Although this result would not seem to follow directly from the stated rationale of *Jackson,* considerations of

[5] See *Pope* v. *United States,* 392 U.S. 651. Accordingly, this is not a case where refusal of retroactive application of the right asserted by petitioner would result in later litigants being treated differently than the litigant in whose case the right was announced. Compare *Desist* v. *United States,* 394 U.S. 244, 255 (Douglas J., dissenting), 258 (Harlan, J., dissenting).

due process would prevent carrying out the execution of persons who subjected themselves to a risk of the death penalty which under the Constitution they were not required to bear.

Since petitioner in this case pleaded guilty to the indictment, he obviously was not penalized for exercising his right to a jury trial. His challenge to his conviction is premised on that part of the rationale of the *Jackson* opinion in which the Court concluded that the death penalty provision had the "inevitable effect" of "needlessly" encouraging guilty pleas and jury waivers (390 U.S. at 581–583). The Court's concern with this consequence of the statute suggests two ways in which the *Jackson* decision might affect the validity of a guilty plea entered at a time when the death penalty provision had not been stricken.

The first approach to the problem, essentially adopted by the petitioner in the instant case, is that the rationale of *Jackson* constitutes a declaration that all guilty pleas entered prior to *Jackson* are invalid because the statutory scheme violated the defendant's "right" to determine his plea without "needless encouragement" to plead guilty. As we show below (pp. 12–14, *infra*), however, the Court in *Jackson* specifically rejected the suggestion that its decision had the effect of automatically invalidating all previous guilty pleas under the kidnapping act. In addition, even if the *Jackson* decision is authority for a right to be free from "needless encouragement", the principles announced by this Court in recent decisions dealing with the question of retroactivity of newly announced rights lead to the conclusion that effectuation

of such a right does not require the automatic release of all defendants who had pleaded guilty prior to *Jackson*.

The second way in which *Jackson* may be interpreted as affecting prior guilty pleas is under the theory that it announces new standards to be applied within the established rule that an involuntary guilty plea is invalid and subject to collateral attack.[6] This is the approach taken by the Fourth Circuit in *Alford* v. *North Carolina*, 405 F. 2d 340, No. 50, this Term (probable jurisdiction noted, 394 U.S. 956), in which the court held that the impermissibility of the encouragement is a factor to be taken into consideration in determining the voluntariness of the guilty plea, and that a plea which is "principally motivated" by a desire to avoid the death penalty is involuntary. In our view, however, this interpretation of *Jackson* misconstrues the import of the Court's conclusion that the statute "unnecessarily" discouraged exercise of the right to trial by jury. Insofar as it is relevant to the question of voluntariness, that conclusion may be viewed as a justification for invalidating the death penalty provision without detailed findings as the extent to which it actually caused involuntary guilty pleas or jury waivers; the lack of necessity for the discouragement added nothing to its potentiality for compulsion.

Finally, when the facts of the present case are tested under the traditional standard for determining the voluntariness of a guilty plea—*i.e.*, whether fear of the death penalty overcame the capacity to make

[6] See, *e.g.*, *Machibroda* v. *United States*, 368 U.S. 487, 493; *Waley* v. *Johnston*, 316 U.S. 101, 104; *Walker* v. *Johnston*, 312 U.S. 275, 286; see also *Herman* v. *Claudy*, 350 U.S. 116, 118.

a free and rational decision—we submit that petitioner's guilty plea was voluntary (*infra,* pp. 31–38). The evidence adduced at the postconviction hearing shows that petitioner determined to plead guilty after his codefendant, who had confessed to the crime and implicated petitioner, had announced his intention to plead guilty. Petitioner's decision was confirmed by the advice of competent counsel, after thorough investigation of the government's case and the possible theories of defense, that there was no hope for acquittal after trial. The fact that petitioner in these circumstances was influenced by the fact that a guilty plea would remove any risk of a death sentence does not establish that his plea was involuntary.

PETITIONER'S GUILTY PLEA, WHICH THE COURTS BELOW FOUND WAS VOLUNTARILY ENTERED UNDER ESTABLISHED STANDARDS FOR TESTING THE VOLUNTARINESS OF A GUILTY PLEA, SHOULD NOT BE SET ASIDE BY REASON OF THIS COURT'S DECISION IN *UNITED STATES* V. *JACKSON*

A. THE COURT'S FINDING IN *Jackson* THAT THE FEDERAL KIDNAPPING ACT "NEEDLESSLY ENCOURAGED" GUILTY PLEAS DID NOT ESTABLISH A PRINCIPLE WHICH IS APPLICABLE RETROACTIVELY TO INVALIDATE ALL PRE-*Jackson* GUILTY PLEAS WITHOUT A SHOWING THAT THE PLEA WAS INVOLUNTARY

The implicit premise of petitioner's argument is that the Court's reasoning in *Jackson,* that the death penalty provision of the kidnapping act "needlessly encourag[ed]" guilty pleas and jury waivers, was equivalent to the announcement of a constitutional "right" to be free from such needless encouragement. Petitioner concludes that this "right" should be given retroactive application in behalf of all defendants who pleaded guilty to capital kidnapping indictments

or waived jury trial prior to *Jackson*.[7] Although petitioner's argument appears to contemplate that there would have to be a showing that the defendant in fact had been "needlessly encouraged" by the availability of the death penalty after a jury trial, the rule for which petitioner argues would necessarily require the setting aside of all prior convictions. The Court in *Jackson* found that the "inevitable effect" of the capital punishment provision was to encourage guilty pleas and jury waivers, and it held as a matter of law that this encouragement was "needless" (390 U.S. at 581–583). As a practical matter, all that remains to be shown under petitioner's submission is that the death penalty was a "definite factor" in the defendant's decision (Br. 35), and it is virtually impossible to imagine a case in which a defendant did not take into account that his guilty plea would obviate any risk of a death sentence.

1. Even if it is assumed that the rationale of *Jackson* can be viewed as a resting solely on an implicit "right" to be free from "needless encouragement"—an assumption which may be unfounded, see pp. 19–22, *infra*—we submit that this right may not be invoked in collateral attack on pre-*Jackson* convictions. Before discussing the principles announced in recent decisions dealing with the retroactivity question, it is important to point

[7] Although petitioner phrases his argument in terms that a "needlessly encouraged" guilty plea is "involuntary" as a matter of law (Br. 34), his resort to the involuntariness concept is nothing more than a vehicle to justify the application of the *Jackson* rationale to pre-*Jackson* guilty pleas. His submission assumes that "involuntariness" is a concept which is discrete from "coerced" (Br. 35), a distinction for which we can find no authority.

out that the Court in *Jackson* specifically negated any inference of retroactive effect of the rationale on which petitioner relies. The Court said (390 U.S. at 583).

> It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. * * * [Emphasis in original.]

The Court added in a footnote (*ibid.*, N. 25):

> * * * So, too, in *Griffin* v. *California*, 380 U.S. 609, the Court held that comment on a defendant's failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial. Yet it obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled.

In the same footnote, the Court cited *Laboy* v. *New Jersey*, 266 F. Supp. 581, 584 (D. N.J.,), in which

the district court held that although the defendant in that case "was greatly upset by the possibility of receiving the death penalty," his *non vult* plea was not coerced under traditional standards and therefore was not subject to collateral attack. Although the Court's comments in *Jackson* concerned collateral attacks on the ground of "involuntariness", which we discuss below, it is unlikely that the Court would have specifically rejected the suggestion that all previous guilty pleas were involuntary if it had contemplated that all such pleas would be subject to collateral attack on the independent "needless encouragement" ground which is the basis of petitioner's argument.

This Court's decisions establish that the determination whether a newly enunciated right is to be given retroactive or only prospective application depends upon "the purpose" which the right serves, "the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application." *Johnson* v. *New Jersey,* 384 U.S. 719, 727; see *Stovall* v. *Denno,* 388 U.S. 293, 297. Reference to all three criteria militates against petitioner's contention that the rationale of *Jackson* may be invoked to set aside pre-*Jackson* guilty pleas.

The adverse effect on the administration of justice of making retroactive the right not to be "needlessly encouraged" would probably be substantial, in terms both of the number of persons affected and the seriousness of the offenses of which they were convicted. There are at least ten cases presently in the courts in which a federal prisoner convicted on a guilty plea

seeks release upon the basis of *Jackson*.[8] As of June 1969, there were approximately 120 federal prisoners in custody for pre-*Jackson* convictions of kidnapping on the basis of guilty pleas or bench trial, although an unknown number of these prisoners may not have been charged in capital indictments; approximately 35 other prisoners were in custody for similar pre-*Jackson* convictions of rape in violation of D.C. Code, § 22–2801 (which also required a jury recommendation for imposition of the death penalty). There are an additional, but undeterminable, number of federal prisoners who had pleaded guilty to or been convicted by bench trial of kidnapping or killing in the course of a bank robbery (the penalty for which was death if the jury so directed).[9]

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[8] *McFarland* v. *United States*, petition for certiorari pending, No. 830 Misc., this Term; *Lone* v. *United States*, appeal pending, C.A. 9, No. 24958; *Wilson* v. *United States*, appeal pending, C.A. 4, No. 14023; *Tafoya* v. *United States*, Civ. No. 7615, D. N.M., motion pending (petitioner's codefendant); *Drake* v. *United States*, No. IP 68–C–197, S.D. Ind., decided October 15, 1969; *Taylor* v. *United States*, No. 4–67 Civ. 246, D. Minn., 4th Div., motion pending; *McNabola* v. *United States*, C.A. 6875–N, E.D. Va., Nor. Div., motion pending; *Pindell* v. *United States*, Civ. No. 19222, D. Conn., pending on remand; *Fritts* v. *United States*, Civ. No. 18797, D. Md., motion pending; *Overman* v. *United States*, No. 1857, W.D. Tenn., E. Div., decided September 24, 1969, on appeal to C.A. 6.

[9] The figures are derived in the following manner: Bureau of Prisons statistics show that as of June 1969, there were 172 federal prisoners in custody for kidnapping who had been convicted as of June 1968, the date of the *Jackson* decision. Figures of the Administrative Office of the United States Courts show that between 1951 and 1968, there were a total of 669 convictions for violation of the kidnapping act, of which 485, or over 70%, resulted from pleas of guilty or *nolo contendere* or bench trials (453 on pleas, 32 after bench trials). Seventy percent of 172 is 120. Relevant figures for District of Columbia

In addition, there is an undetermined number of State prisoners who would be entitled to release under the theory advanced by petitioner in this case. The death penalty for certain offenses was preconditioned on a jury recommendation in three States: aggravated rape (Nevada Rev. Stat. [1967], § 200.363), aggravated kidnapping (Wyoming Stat. [1957], § 6–59), and first degree murder (New Hampshire Rev. Stat. Ann. [1955], § 585:4). If the North Carolina capital sentencing structure is held invalid under *Jackson,* the rationale of such a decision may call into question the present or former sentencing procedures in at least three other states,[10] and a court-fashioned procedure in a fourth.[11] See Brief for Respondent, *Parker* v. *North Carolina,* No. 268, this Term, pp. 26–27.

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rape convictions (obtained from the Bureau of Prisons and the D.C. Department of Corrections) show a total of 91 prisoners in custody who had been convicted as of June 1968. Between 1952 and 1968, Administrative Office figures show a total of 171 convictions—60 on pleas of guilty or nolo contendere and 5 after bench trials, for a total of 65, or 38%. This would produce an estimate of 35 in custody as of June 1968 who pleaded guilty or waived jury trial. We can make no estimate in regard to bank robbery because the Bureau of Prisons does not distinguish between those charged with the capital and those charged with the non-capital offense.

[10] See New Jersey Stat. Ann., §§ 2A:113–3, 2A:113–4; Vernon's Ann. Code Crim. Proc. of Texas, Art. 1.14; West's La. Code Crim. Proc., tit. 16, art. 557; N.Y. Penal Law of 1909, §§ 1045(2), 1250(B), added L. 1963, c. 994, §§ 1, 3 (rescinded in 1967); South Carolina Code (1968 Supp.), § 17–553.4. The South Carolina provision was held unconstitutional on the authority of *Jackson* by the State supreme court, but the court's remedy was to invalidate the ameliorative provision rather than the capital one. See *State* v. *Harper*, 162 S.E. 2d 712, 715 (1968).

[11] The Supreme Court of Mississippi has interpreted the capital statutes of the State as authorizing only a jury to assess the death penalty. *Dickerson* v. *State*, 202 Miss. 804, 807 32 So. 2d

With the exception of the Nevada Supreme Court's decision in *Spillers* v. *State*, 436 P. 2d 18, 22–23 (1968), the result in *Jackson* was not foreshadowed.[12] On the other hand, prior to this Court's decision the reasoning of the district court in *Jackson* had been rejected by three other district courts. See *McDowell* v. *United States*, 274 F. Supp. 426, 429–431 (E.D. Tenn.); *Laboy* v. *New Jersey*, *supra*, 266 F. Supp. at 584–585; *Robinson* v. *United States*, 264 F. Supp. 146, 151–152 (W.D. Ky.), affirmed (after *Jackson*), 394 F. 2d 823 (C.A. 6), certiorari denied, 393 U.S. 1057. Indeed, prior to *Jackson*, some members of this Court had suggested that the requirement of jury authorization for imposition of the death sentence was ameliorative and preferable to legislation which granted the judge sole authority to impose capital punishment. See *Rosenberg* v. *United States*, 346 U.S. 273, 299 (Black, J., dissenting), 317 (Appendix to Opinion of Douglas, J., dissenting). There was no reason for the judge who accepted petitioner's plea in this case to believe that the Constitution barred either his acceptance of the plea or his submission of the sentence issue to the jury in the event that petitioner had elected a jury trial.

Finally, and most importantly, retroactive application of a defendant's right to determine his plea with-

881 (*en banc*, 1947); *Bullock* v. *Harpole*, 223 Miss. 486, 494, 102 So. 2d 687, 690 (1958).

[12] In an early decision, the Court of Appeals for the District of Columbia, in holding that a judge was under no compulsion to accept a guilty plea to rape, had suggested that the authority to accept a guilty plea might be lacking in order to harmonize the statute with the Sixth Amendment (*Green* v. *United States*, 40 App. D.C. 426, 429–430 (1913)), but the suggestion was thereafter treated as unpersuasive dictum. *United States* v. *Willis*, 75 F. Supp. 629, 630 (D.D.C.).

out "needless encouragement" would not be required to satisfy the purpose of such a rule, which petitioner claims is the avoidance of the "potentiality for inducing involuntary pleas of guilty" (Br. 21). If "needless encouragement" constituted coercion of guilty pleas (which we show it does not, see pp. 22–30 *infra*), retroactivity would be necessary. See *Kercheval* v. *United States*, 274 U.S. 220, 223. A guilty plea which is actually coerced calls into question "the reliability of the fact-finding process," *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 729, and "infect[s] a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *Shott*, 382 U.S. 406. But, as our earlier quotation from the *Jackson* opinion shows, see p. 13, *supra*, the decision in that case was not premised on the findings that all guilty pleas under the statute had been coerced. To the extent that *Jackson* did "guard against the possibility of unreliable" convictions, *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 730, the danger of involuntary guilty pleas inherent in the Kidnapping Act was no greater than the danger of compelled confessions inherent in the incustody interrogations which were the subject of *Johnson*. In any case in which a guilty plea has in fact been coerced by the defendant's fear of the death penalty, see pp. 33–35, *infra*, the nonretroactivity of the right to an unencumbered choice asserted by petitioner will not preclude that defendant from obtaining his release by demonstrating actual coercion. *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 730; see *Halliday* v. *United States*, 394 U.S. 831, 833. Therefore, "[t]he values implemented by the right" to such

a choice "would not be measurably served by requiring retrial of all persons convicted in the past" by bench trials or guilty pleas which were not actually involuntary. See *De Stefano* v. *Woods*, 392 U.S. 631, 634.

2. It is appropriate to submit this additional consideration with respect to the "purpose" of the rule in *Jackson* as a criterion for determining whether that decision requires the setting aside of earlier guilty pleas. Petitioner's argument, which we discussed in the preceeding section, rests on the premise that the sole purpose of the *Jackson* rule was to excise an improper consideration from a defendant's choice of plea and mode of trial. That premise finds support in the Court's expressed concern for the effect which the statute had on a defendant's choice at arraignment. But there is, within the *Jackson* opinion itself, the root of a complementary rationale, premised directly on the Sixth Amendment, which leads to the invalidation of the death penalty provision in the interest of those defendants who do exercise their right to a jury trial. This additional policy underlying the *Jackson* holding provides further support for the conclusion that that decision does not affect the validity of guilty pleas entered prior to its announcement.

Our preceding discussion adopted petitioner's assumption, based on the Court's discussion in *Jackson* of the statute's "needless encouragement," that the defect in the death penalty provision was that it had a potential for inducing involuntary guilty pleas and jury waivers. On that assumption, the decision might be viewed as consistent with earlier decisions in which the Court fashioned special rules for situations in

which there is a risk of the deprivation of basic rights. See, *e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436; *United States* v. *Wade*, 388 U.S. 218. But on close analysis of the Court's rationale, we doubt whether it is correct to interpret the decision as proceeding solely from a concern that the statute had the potential for inducing involuntary decisions. Assuming *arguendo* that it would be constitutionally permissible to impose the death sentence only on defendants who elect a jury trial, Mr. Justice White's suggestion, in dissent, that careful examination by the trial judge would identify and remedy any cases in which a tendered plea was in fact involuntary would at least obviate the risk of involuntariness in those cases in which involuntariness was most evident. The remedy of rejecting a guilty plea or a jury waiver in those cases where the defendant is obviously overcome by the fear of a death sentence would to that extent fully satisfy any concern for the avoidance of involuntary pleas.

The Court's rejection of that solution to the voluntariness problem—which, it should be noted, would impose on an apprehensive defendant the risk that he fears the most—suggests that an additional policy may have informed the Court's decision. This policy, we believe, is found in the answer to the fundamental question previously assumed—whether, irrespective of any encouragement or potential for involuntariness, it is constitutionally permissible to impose death sentences only on defendants who elect to be tried by a jury rather than by a judge. Resolution of that question might have been viewed as premature in the pro-

cedural posture of the *Jackson* case, since the district court had dismissed the indictment and it could not be known whether the defendant would elect a jury trial. The question would have been squarely framed, however, if the challenge to the death penalty provision had been presented on the petition of a defendant who had elected jury trial, been convicted, and sentenced to death.

If such a case had preceded *Jackson,* there is no doubt that the death penalty provision would have been invalidated, perhaps without reference to the statute's encouragement to plead guilty.[13] The violation of the defendant's Sixth Amendment right in that case would come squarely within the rationale of *Griffin* v. *California,* 380 U.S. 609, on which the Court relied in *Jackson.* The unjustified imposition of a more severe penalty on a defendant who exercises his right to a jury trial—like the comment on a defendant's refusal to testify condemned in *Griffin*—is, by itself, an impairment of the constitutional right.

[13] In a case in this posture, it of course would have been possible for the Court to cite the statute's "inevitable effect" of encouraging guilty pleas and jury waivers as a basis for decision, but the granting of relief to the defendant would raise the problem that he had not been prejudiced by that defect in in the statute. Cf. *Bumper* v. *North Carolina,* 391 U.S. 543, 545. The Court might nevertheless have declared the death penalty provision unconstitutional on that ground and granted relief to the defendant (resentencing) on the theory that such a decision was appropriate to spare future defendants the needless encouragement which the Court found in *Jackson.* But the rationale suggested here would seem to focus more precisely on the fundamental defect in the statute which such a case would have presented.

By placing this condition on the right to a jury trial, the Kidnapping Act deprived defendants of the right which the Sixth Amendment most reasonably affords—*i.e.*, a right to a trial before a jury on the same terms and conditions as a trial before a judge.

To give effect to this underlying policy of the *Jackson* holding, it is not necessary to disturb previous guilty pleas. The purpose of the rule which it compels is not to establish a new right with respect to the defendant's choice of a plea, but rather to vindicate the right to a jury trial for those who chose to exercise it. We, of course, do not suggest that this policy should be viewed as the sole foundation of the *Jackson* decision. Our submission here is only that recognition of this additional ground for the decision is a further justification for the refusal to set aside guilty pleas on the basis of the *Jackson* rationale.

B. THE FACT THAT THE DEATH PENALTY PROVISION "NEEDLESSLY" ENCOURAGED GUILTY PLEAS IS IRRELEVANT TO THE QUESTION WHETHER FEAR OF THE DEATH PENALTY RESULTED IN AN INVOLUTARY GUILTY PLEA IN THE CIRCUMSTANCES OF A PARTICULAR CASE

1. The decision of the Court of Appeals for the Fourth Circuit in *Alford* v. *North Carolina*, 405 F. 2d 340, No. 50, this Term (probable jurisdiction noted, 394 U.S. 956), presents a different approach to the problem involved here. Contrary to the position of the petitioner in the instant case, the court in *Alford* did not agree that a defendant who had pleaded guilty was necessarily entitled to post-conviction relief as a matter of law on the basis of *Jackson*. The court did hold, however, that "*Jack-*

son, by defining what are the impermissible burdens" upon the right to contest guilt "defined a new factor to be given weight in determining the voluntariness of a plea" (405 F. 2d at 347). On this premise, the Fourth Circuit concluded that a "prisoner is entitled to relief if he can demonstrate that his plea was a product of those burdens—specifically, that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty" (*ibid.*).[14]

Although we agree with the Fourth Circuit that *Jackson* did not establish a new ground for postconviction relief supplanting the test of involuntariness of the guilty plea, we disagree with the court's conclusion that the "needlessness" or "impermissibility" of the encouragement to plead guilty is a factor to be considered in determining whether a defendant's guilty plea was in fact involuntary. The court's holding—that a showing that avoidance of the death penalty was the defendant's principal motivation is sufficient, without more, to establish the involuntariness of a guilty plea—proceeds from a misunderstanding of the significance of this Court's finding in *Jackson* that the differential sentencing provisions were "unnecessary." As we read *Jackson*, the fact that the burden on the right to a jury trial was unnecessary was not a ground for finding that the encouragement was coercive, but rather was a reason for concluding that the

[14] The Fourth Circuit's application of the *Jackson* rationale was premised on its holding that the North Carolina capital punishment provisions (also involved in No. 268, this Term), like the federal kidnapping statute, created an unnecessary encouragement to plead guilty (405 F. 2d at 344–345). We take no position on this question.

burden should be removed in all cases without detailed assessment of the risk of actual coercion.

The Court's observation in *Jackson* that the "inevitable effect" of the death penalty provision is "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial" (390 U.S. at 581) was the beginning rather than the end of the Court's analysis. If the Court had held the death penalty provision invalid on that basis alone, its ruling would have cast doubt upon the validity of a number of statutory schemes which undeniably "encourage" defendants to forego jury trials or enter pleas of guilty to avoid imposition of the death penalty. There are many situations in which, either as a matter of law or as a matter of fact, assertion of the right to contest guilt is inevitably discouraged because "the defendant who abandons the right * * * is assured that he cannot be executed." A prime example is the choice faced by a defendant charged with murder in the first degree, who can preclude the death sentence by pleading guilty to either of the lesser included offenses of murder in the second degree or manslaughter. Similarly, a defendant charged with a capital count and non-capital counts in the same indictment, or under two indictments, one of which is capital, can preclude the death penalty by pleading guilty to the non-capital charges in return for dismissal or non-prosecution of the capital charges. Nor is the inevitable discouragement limited to capital cases; as the dissent below in *Alford* noted, "a defendant may have a greater fear of the risk of a more likely

sentence of life imprisonment than of the risk of less likely capital punishment" (405 F. 2d at 350).[15]

The crucial distinction between the foregoing situations and the effect of the Kidnaping Act is that in regard to the former the encouragement to plead guilty is unavoidable, while in regard to the latter it is not. Thus, it has long been thought to be a basic right of a defendant to have the trier of fact consider whether he is guilty of only a less serious degree of the offense with which he is charged. *Stevenson* v. *United States,* 162 U.S. 313, 314–315; *Berra* v. *United States,* 351 U.S. 131, 134; *Sansone* v. *United States,* 380 U.S. 343, 349. On like reasoning, it would appear to be a defendant's right to have the trier consider whether he is guilty of only the less serious of the statutory violations growing out of the same transaction. Yet neither of these rights can be afforded without leaving him an opportunity (and hence an encouragement) to avoid the greater penalty by pleading guilty to the lesser offense. Similarly, a person should not be able to escape prosecution and punishment for one offense merely because he has committed another.

[15] A case presently before the Fourth Circuit is illustrative. The defendant was charged, prior to *Jackson*, with both kidnaping and assault with intent to rape (the maximum penalty for which is twenty years imprisonment), and pleaded guilty to the latter. The decision in *Jackson* intervened before sentencing, and consequently the court, informing him that he would no longer risk a death sentence if he were to be convicted by the jury of kidnaping, offered him an opportunity, which he rejected, to withdraw his guilty plea. Upon appeal he contends that he pleaded guilty initially because of fear of the death penalty and thereafter rejected the opportunity to withdraw the plea because of fear of a life sentence. *United States* v. *Tucker*, No. 12,618, Appellant's Br. 6, 8.

Yet multi-count indictments or several indictments brought against the same person for different offenses necessarily encourage the defendant to minimize his punishment by means of a guilty plea to a single indictment or to a single count.

In *Jackson,* the government had argued that the sentencing structure of the Kidnapping Act had the ameliorative purpose of "mitigat[ing] the severity of capital punishment" by "limiting the death penalty to cases in which a jury recommends it" (390 U.S. at 582). Although the Court found this purpose to be "an entirely legitimate one," it concluded that the purpose "can be achieved without penalizing those defendants who plead not guilty and demand jury trial" (*ibid.*). Accordingly, the Court held that the encouragement of guilty pleas and jury waivers was impermissible because it "needlessly penalizes the assertion of a constitutional right." *Id.* at 583. Thus, while lesser included offenses, multi-count indictments and multiple indictments encourage guilty pleas as much as do statutes which, like the Kidnapping Act, condition imposition of the maximum penalty upon a jury determination, only in the case of a statutory scheme which involves *needless* encouragement does *Jackson* hold the burden to be constitutionally impermissible.

2. To rely, as the Fourth Circuit did in *Alford,* on the "impermissibility" of the burden as a crucial factor in assaying the extent of coercion is to misconstrue the nature of coercion. The Court in *Jackson* invalidated the death penalty provision because the statute's

encouragement of guilty pleas was avoidable. But avoidability provides only a reason for removing the source of the encouragement; it adds nothing to the encouragement's compelling force.

Petitioner in the present case, for example, was undoubtedly "encouraged" to plead guilty by fear of the death penalty. But although his offense, which involved multiple rape, was sufficiently heinous for a capital recommendation by a jury to be a realistic possibility, such a recommendation was not certain, nor even highly probable. In its entire history, only six persons have been executed for violating the Kidnapping Act, and only the first did not kill his victim under egregious circumstances.[16] Thus while the encouragement which the statute afforded petitioner to plead guilty was "impermissible", it was hardly more compelling than the unavoidable (and hence permissible) encouragement of a guilty plea to second degree

[16] Arthur Gooch, who was convicted in 1934 and executed in 1936 at the height of the "outlaw gang" era when public outrage was intense. See *Gooch* v. *United States*, 82 F. 2d 534, 536 (C.A. 10), certiorari denied, 298 U.S. 658. Henry J. Seadlund (executed in 1938) deliberately killed his victim after receiving the ransom money. See *Seadlund* v. *United States*, 97 F. 2d 742, 744 (C.A. 7). Bonnie Brown Heady and Carl Austin Hall (executed in 1953) kidnapped a seven-year old boy whom they killed while continuing to negotiate for the ransom (No. 18671, W.D. Mo., 1953). Arthur Ross Brown (executed in 1956) kidnapped, then raped and immediately thereafter shot to death a young housewife and mother (No. 19376-Cr., W.D. Mo., 1956). Victor Harry Feguer (executed in 1961) lured a doctor from his home upon a false mission of mercy, kidnapped him and thereafter killed him. See *Feguer* v. *United States*, 302 F. 2d 214, 220–221 (C.A. 8), certiorari denied, 371 U.S. 872.

murder or manslaughter which an indictment for first degree murder affords.[17]

The erroneous premise of the "principal motivation" test formulated by the Fourth Circuit in *Alford* is illustrated by the fact that the defendant in that case pleaded guilty to murder in the second, rather than the first, degree. "To us," the court said, "the *Jackson* defect in the North Carolina statutes potentially infects the validity of the acceptance of a plea of guilty to any lesser included offense," although

[17] There is more compelling encouragement, in fact, to plead guilty to second degree murder or manslaughter than there was before *Jackson* to plead guilty to kidnapping. A kidnapping defendant could have contested his guilt and still avoided the risk of capital punishment by waiving a jury trial, while a bench trial for murder affords no insurance against the death penalty. Compare *Pindell* v. *United States*, 296 F. Supp. 751, 753 n. 3 (D. Conn.). Additionally, a guilty plea to second degree murder or manslaughter precludes any possibility of the death penalty being assessed, while until this Court held to the contrary in *Jackson* (390 U.S. at 576–581) it was assumed that a jury could be convened to assess penalty after a guilty plea to kidnapping was accepted. *Seadlund* v. *United States*, *supra*, 97 F. 2d at 748; see also *United States* v. *Dalhover*, 96 F. 2d 355 (C.A. 7), certiorari denied, 305 U.S. 632. The death sentences for four of the six persons executed for kidnapping (Seadlund, Heady, Hall and Brown) were, in fact, recommended by such after-convened juries. Concededly, the jury waiver avenue of escape was apparently unavailable to petitioner here, since the judge who accepted his plea let it be known in advance that he would not consider a bench trial. On the other hand, while the judge also expressed disapproval of the penalty jury procedure, he did not do so until petitioner's plea was tendered and accepted; petitioner thus had no way of knowing in advance that his plea would totally foreclose the possibility of capital punishment. Compare *McFarland* v. *United States*, C.A. 4, No. 13,146, decided May 1, 1969, petition for certiorari pending, No. 830 Misc., this Term.

there is "a higher burden of proof" upon one attacking such a plea. 405 F. 2d at 347 n. 17. The *"Jackson* defect" which the court found in the state statutory scheme, however, was that capital punishment could be avoided by a guilty plea to *first* degree murder; were it not for that statutory provision, the state's sentencing structure would, in the court's eyes, apparently have been free of fault (see *id.* n. 19). Thus, if a defendant whose "principal motivation * * * was to avoid the death penalty" (405 F. 2d at 347) pleaded guilty to second degree murder, and that had been the only statutory avenue of avoidance open to him, his plea would not, under the court's reasoning, have been coerced. Yet the *same* motivation was held to make the *same* plea coerced because the alternative but unused avenue of pleading to first degree murder—which the court found to be impermissible—was also left open to him by statute.

Contrary to the Fourth Circuit's position, fear of the death penalty, even if a principal motivation for the plea, can hardly be deemed the equivalent of coercion.[18] A normal motivation—quite often the princi-

[18] Courts which have considered the question whether a reasonable fear of the death penalty is *per se* coercive and consistently held that it is not:

Guilty plea which precluded a death recommendation by the jury: *Overman* v. *United States*, 281 F. 2d 497, 499 (C.A. 6). Guilty plea to lesser included non-capital offense: *United States ex rel. Robinson* v. *Fay*, 348 F. 2d 705, 707 (C.A. 2), certiorari denied, 382 U.S. 997; *Godlock* v. *Ross*, 259 F. Supp. 659, 661 (E.D.N.C.). Plea of non-vult to first degree murder, upon which no greater sentence than life imprisonment could be imposed: *Laboy* v. *New Jersey*, 266 F. Supp. 581, 584 (D. N.J.). Guilty plea to non-capital counts in return for dismissal of capital count: *Martin* v. *United States*, 256 F. 2d 345, 347–349 (C.A. 5),

pal motivation—of a defendant who enters a plea of guilty to a lesser included offense is the fear that a trial on the greater charge might lead to a more severe sentence, whether the greater charge carries with it the possibility of death or merely a long term of years. If motivation alone were decisive, a defendant would never be in a position to make those decisions which are essential to the proper operation of our criminal law system (see *Jackson,* 390 U.S. at 584-585).[19]

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certiorari denied, 358 U.S. 921; *Gilmore* v. *People of State of California*, 364 F. 2d 916, 918 (C.A. 9). Guilty plea to capital indictment upon understanding that prosecutor would either recommend against or not press for the death penalty: *Busby* v. *Holman*, 356 F. 2d 75, 80 (C.A. 5); *Cooper* v. *Holman*, 356 F. 2d 82, 85 (C.A. 5), certiorari denied, 385 U.S. 855. Guilty plea to noncapital federal indictment in return for promise by state prosecutor to dismiss capital state indictment: *United States* v. *Thomas*, C.A. 9, No. 22,658, decided August 12, 1969. Guilty plea which precluded a capital direction by federal jury, induced in part by hope that capital state indictment would consequently be dismissed: *McFarland* v. *United States*, 284 F. Supp. 969, 977-978 (D. Md.), affirmed, C.A. 4, No. 13,146, decided May 1, 1969), petition for certiorari pending, No. 830 Misc., this Term.

[19] See A.B.A., Project on Minimum Standards for Criminal Justice, *Standards Relating to Pleas of Guilty*, pp. 60-76 (1967), which recognizes the advantages to the accused and to the criminal justice system of guilty pleas entered pursuant to agreements with the prosecuting attorney and which promulgates standards for ensuring that such agreements result in accurate and voluntary dispositions. See generally Newman, *Conviction* (1967).

C. TESTED UNDER THE TRADITIONAL STANDARD FOR DETERMINING THE VOLUNTARINESS OF A GUILTY PLEA—WHETHER THE DEFENDANT WAS DEPRIVED OF THE CAPACITY TO MAKE A FREE AND RATIONAL DECISION—THE FACTS IN THIS CASE ESTABLISH THAT PETITIONER'S GUILTY PLEA WAS VOLUNTARY

1. Regardless of the maximum penalty involved, the generally accepted test for the voluntariness of a guilty plea is not whether fear of the penalty was a "definite factor" in the defendant's determination, as petitioner urges (Br. 35), or the "principal motivation" for the plea, as the court of appeals held in *Alford* (405 F. 2d at 347, 349), but rather whether that fear or any other inducement to which the defendant was subjected was sufficient to overcome his capacity to make a free and rational decision. See, *e.g.*, *Busby* v. *Holman*, 356 F. 2d 75, 80 (C.A. 5); *Cortez* v. *United States*, 337 F. 2d 699, 701 (C.A. 9), certiorari denied, 381 U.S. 953; *Alden* v. *Montana*, 234 F. Supp. 661, 670 (D. Mont.), affirmed, 345 F. 2d 530 (C.A. 9); *United States* v. *Tateo*, 214 F. Supp. 560, 565 (S. D. N.Y.); *Laboy* v. *New Jersey*, 266 F. Supp. 581, 584 (D. N.J.). A plea "motivated" by a desire to avoid more stringent punishment is not involuntary if it is "a well considered, prudent choice of the lesser of two evils." *Barber* v. *Gladden*, 327 F. 2d 101, 104 (C.A. 9), certiorari denied, 377 U.S. 971. Although this Court has not had occasion to speak definitively on this issue,[20] the "capacity for choice" test is con-

[20] The cases which the Court has considered (such as *Machibroda*, *Waley*, and *Walker*) have involved the issue whether a defendant is entitled, on the basis of his allegations, to a hearing on his claim of coercion. To our knowledge, no case has been before the Court involving the issue whether coercion was established by the evidence adduced at a postconviction hearing.

sonant with the standard which it has enunciated for evaluating the voluntariness of a confession. See, *e.g.*, *Lisenba* v. *California*, 314 U.S. 219, 241; *Blackburn* v. *Alabama*, 361 U.S. 199, 207–208; *Rogers* v. *Richmond*, 365 U.S. 534, 544; *Miranda* v. *Arizona*, 384 U.S. 436, 464-465; *Garrity* v. *New Jersey*, 385 U.S. 493, 497.

An accused makes "a well considered, prudent choice of the lesser of two evils" when, having the reasonable "belief that his acts were proscribed by law and that he cannot successfully be defended," he concludes that a guilty plea is mandated by "the dictates of self-interest" because it offers him something valuable in return—frequently, as in this case, an opportunity to mitigate his sentence. See *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 276. Thus, the essential inquiry in assessing the voluntariness of a guilty plea is whether the defendant's fear of the consequences of an unsuccessful contest of his guilt was such as to deprive him of the capacity to make an intelligent evaluation of his chances for acquittal and act rationally on that evaluation.[21]

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[21] Proceeding from the premise that a guilty plea which was "needlessly encouraged" by the death penalty provision is "involuntary" as a matter of law (see p. 12 n. 7, *supra*), petitioner argues that the test should be whether the death penalty was a "definite factor" in the defendant's decision; he supports this test by an analogy to guilty pleas which are "based" upon or "caused" by a coerced confession, assuming that such pleas are "involuntary" (Br. 35–41). However, the question of whether a defendant is entitled to a habeas corpus hearing on a claim that his guilty plea was induced by a coerced confession is before this Court in *McMann* v. *Ross*, No. 153, this Term, certiorari granted, October 13, 1969. Even if the Court in that case holds that guilty please following coerced confessions may be invalid in certain circumstances, that decision need not rest on principles which are

In resolving this question, which must be decided on the facts of each case, it is clear that involuntariness cannot be found from the mere fact that the accused is made aware of the penalty which may be imposed after trial and of the effect which a guilty plea may have in avoiding that penalty. "[A] fair description" by the trial court "of the consequences attendant upon the [defendant's] choice of plea" is "manifestly essential to an informed decision on [his] part." *United States ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308, 314 (C.A. 2); same, 348 F. 2d 373, 376 (C.A. 2), certiorari denied, 383 U.S. 952. Nor is it improper for the prosecutor to announce his intention to seek the maximum penalty if the case goes to trial. *Barber* v. *Gladden,* 220 F. Supp. 308, 314 (D. Ore.), affirmed, 327 F. 2d 101, *supra; Lattin* v. *Cox,* 355 F. 2d 397, 400 (C.A. 10). To be sure, it may be found that the defendant's capacity to evaluate the true realities of his situation was impaired where the court or prosecutor put so much stress upon the risks which he would incur by contesting that their statements "were

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relevant to the question whether a plea was involuntary. The relationship between a coerced confession and a guilty plea invokes considerations which go beyond the "voluntariness" concept at issue in this case. A guilty plea, to be valid, must be more than just a product of the defendant's own free choice; it must be made "after proper advice and with full understanding of the consequences." *Kercheval* v. *United States, supra,* 274 U.S. at 223. If a defendant's conclusion that he cannot successfully be defended is based on consideration of a confession which, unbeknownst to him, is subject to suppression, his consequent guilty plea might not meet the *Kercheval* standard.

reasonably calculated to influence [him] to the point of coercion into entering [his plea] of guilty." *Euziere* v. *United States,* 249 F. 2d 293, 295 (C.A. 10). But petitioner properly does not claim any overreaching by the court or prosecutor in this case.

Unlike the court or prosecutor, a defendant's counsel is specifically charged with the duty "to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke* v. *Gillies,* 332 U.S. 708, 721 (plurality opinion); see *Williams* v. *Kaiser,* 323 U.S. 471, 475–476. Such an informed opinion necessarily must include a relative evaluation both of the chances of acquittal and of the probable difference between the severity of the penalty which will be imposed after an unsuccessful trial and that which will be imposed on a guilty plea. See *Moore* v. *Wainwright,* 401 F. 2d 525, 526 (C.A. 5). If after examining the law and facts, counsel is convinced that there is virtually no chance for an acquittal and that a guilty plea provides the only hope for avoiding a probable sentence of death or lengthy imprisonment, it is counsel's duty to encourage the defendant to plead guilty. The defendant is not overreached in these circumstances; any pressures to which he is subject are only those which "have emanated from the realities of the situation." See *United States ex rel. McGrath* v. *LaVallee, supra,* 319 F. 2d at 314.

When it is shown only that a defendant appreciated the risk of a death sentence after trial and heeded the considered advice of competent counsel to plead

guilty, there is no basis for concluding that his capacity to make a voluntary choice was overborne by fear. See *Laboy* v. *New Jersey, supra,* 266 F. Supp. at 584. To conclude that a defendant was acting irrationally under an incapacitating fear of the death penalty, it would have to be shown that his choice was not "prudent"—*i.e.,* that despite his plea, he was in fact innocent, or at least that counsel had encouraged him to surrender a substantial defense.[22] This does not mean that only the innocent are entitled to relief from coerced pleas. But, while guilt or innocence is irrelevant to relief if a defendant's guilty plea is shown to have been coerced, it "is not irrelevant on the issue of whether his plea was, in fact, coerced." *Barber* v.

[22] The district court's decision in *Shaw* v. *United States*, 299 F. Supp. 824 (S.D. Ga.), illustrates the effect which an analysis of the government's proposed proof and the evidence available to the defense may have on a postconviction determination of the voluntariness of a guilty plea. The defendant, a man in his fifties with a long prior record, pleaded guilty to kidnapping a fourteen year old girl for coition purposes and releasing her harmed. The evidence available to the government showed that he had transported both the fourteen year old and another girl of sixteen from Georgia to the Washington area, where he engaged in intercourse with both of them. The district court, reviewing the evidence, determined that much of the government's evidence was consistent with the conclusion that the girls were not being held against their will and that the government's case appeared "to have much greater resemblance to a Mann Act violation that a kidnapping charge" (299 F. Supp. at 832). Against this background, the court concluded that the defendant's will to contest his guilt was overborne by his counsels' insistence that—in light of the youth of the girl and the defendant's prior record—a guilty verdict and a capital recommendation would be the likely outcome of a jury trial. *Id.* at 833.

Gladden, supra, 220 F. Supp. at 313; *Shupe* v. *Sigler,* 230 F. Supp. 601, 605 (D. Neb.).

2. Under the foregoing analysis, the facts in the present case detailed in the Statement, *supra,* demonstrate that petitioner's guilty plea was voluntary. Neither the prosecutor nor the trial court advised the petitioner or attempted in any manner to influence him to plead guilty. Except for his mother's admonition, the only advice which petitioner received to plead guilty came from his counsel, who, he acknowledges, were "competent attorneys and experienced in handling criminal matters" who "did not do anything wrong" (Br. 54–55). Counsels' advice was given only after they had concluded, on the basis of thorough investigation, that there was no likelihood of a successful defense and that a jury trial would result in almost certain conviction and would needlessly expose petitioner to the substantial risk of the death penalty. Petitioner himself, as the district court found, had already come to the same conclusion after learning that his codefendant intended to plead guilty. Nor was there any defect in the proceedings at which petitioner entered his guilty plea.[23] Indeed, petitioner made no effort to assert his innocence, despite being given an opportunity to withdraw his plea prior to imposition of sentence.[24]

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[23] See *McCarthy* v. *United States,* 394 U.S. 459, 465; *Halliday* v. *United States,* 394 U.S. 831, 833.

[24] Unlike petitioner here (and as far as the record shows, petitioner in No. 268 as well) respondent in No. 50 specifically asserted, when he tendered his plea, that he had not committed the homicide with which he was charged and was pleading guilty "because they said if I didn't they would gas me for it"

In these circumstances, the coercive pressures to which petitioner was subject were only those which "emanated from the realities of the situation." There is nothing to suggest that fear of the death penalty overcame his capacity to make a prudent decision with respect to his chance for an acquittal after a trial. At his hearing he offered no evidence, other than his own belated assertion of innocence, to dispute Mr. LaFollette's assessment at the time of the plea that conviction was certain, and he does not dispute that view of the case in this Court but rather emphasizes it (see Br. 10, 48, 50, 54–55). Although it is undoubtedly true that petitioner was motivated to avoid the possibility of a death penalty, there is no basis for concluding that his capacity for rational choice was overborne. Rather, there is sound reason for con-

(Appendix in No. 50, p. 7; see also *id.*, at 8–9). Despite this obvious warning that the plea might not, in fact, have been voluntary the judge made no attempt to explore respondent's state of mind. Rather, he restricted his inquiries to respondent's prior criminal record and then imposed sentence (*id.*, A. 9–11). The court of appeals viewed respondent's assertions of innocence as proof that his plea was primarily motivated by "the incentive supplied" by the State "statutory scheme," and was hence involuntary. 405 F.2d at 347–349. The circumstances of the tender and acceptance of the plea, however, suggests that it may have been unnecessary to reach the question of voluntariness since the conviction would appear to be vulnerable on grounds of the insufficiency of the inquiry made by the judge. See *Boykin* v. *Alabama*, 395 U.S. 238. Although protestations of innocence accompanying a guilty plea would not preclude a judge from accepting the plea or necessarily demonstrate that such a plea was involuntary, see *McCarthy* v. *United States*, 394 U.S. 459, 471, the judge does have a particular duty to conduct further examination of the defendant in order to resolve the contradiction and dispel any doubt as to the voluntariness of the plea before he may accept it.

cluding that petitioner's choice was calculated and reasoned and in accord with the sound advice of counsel seeking the best route for his client.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JOSEPH J. CONNOLLY,
Assistant to the Solicitor General.
JEROME M. FEIT,
MARSHALL TAMOR GOLDING,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

No. 270.—October Term, 1969

Robert M. Brady, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[May 4, 1970]

Mr. Justice White delivered the opinion of the Court.

In 1959, petitioner was charged with kidnaping in violation of 18 U. S. C. § 1201 (a).[1] Since the indictment charged that the victim of the kidnaping was not liberated unharmed, petitioner faced a maximum penalty of death if the verdict of the jury should so recommend. Petitioner, represented by competent counsel throughout, first elected to plead not guilty. Apparently because the trial judge was unwilling to try the case without a jury, petitioner made no serious attempt to reduce the possibility of a death penalty by waiving a jury trial. Upon learning that his codefendant, who had confessed to the authorities, would plead guilty and be available to testify against him, petitioner changed his plea to guilty. His plea was accepted after the trial judge twice

[1] "Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

questioned him as to the voluntariness of his plea.[2] Petitioner was sentenced to 50 years' imprisonment, later reduced to 30.

In 1967, petitioner sought relief under 28 U. S. C. § 2255, claiming that his plea of guilty was not voluntarily given because § 1201 (a) operated to coerce his plea, because his counsel exerted impermissible pressure upon him, and because his plea was induced by representations with respect to reduction of sentence and clemency. It was also alleged that the trial judge had not fully complied with Rule 11 of the Federal Rules of Criminal Procedure.[3]

After a hearing, the District Court for the District of New Mexico denied relief. According to the District

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[2] Eight days after petitioner pleaded guilty, he was brought before the court for sentencing. At that time, the court questioned petitioner for a second time about the voluntariness of his plea:

"THE COURT: . . . Having read the presentence report and the statement you made to the probation officer, I want to be certain that you know what you are doing and you did know when you entered a plea of guilty the other day. Do you want to let that plea of guilty stand, or do you want to withdraw it and plead not guilty?

"DEFENDANT BRADY: I want to let that plea stand, sir.

"THE COURT: You understand that in doing that you are admitting and confessing the truth of the charge contained in the indictment and that you enter a plea of guilty voluntarily, without persuasion, coercion of any kind? Is that right?

"DEFENDANT BRADY: Yes, your Honor.

"THE COURT: And you do do that?

"DEFENDANT BRADY: Yes, I do.

"THE COURT: You plead guilty to the charge?

"DEFENDANT BRADY: Yes, I do." Appendix 29–30.

[3] When petitioner pleaded guilty, Rule 11 read as follows:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court

Court's findings, petitioner's counsel did not put impermissible pressure on petitioner to plead guilty and no representations were made with respect to a reduced sentence or clemency. The court held that § 1201 (a) was constitutional and found that petitioner decided to plead guilty when he learned that his codefendant was going to plead guilty: petitioner pleaded guilty "by reason of other matters and not by reason of the statute" or because of any acts of the trial judge. The court concluded that "the plea was voluntarily and knowingly made."

The Court of Appeals for the Tenth Circuit affirmed, determining that the District Court's findings were supported by substantial evidence and specifically approving the finding that petitioner's plea of guilty was voluntary. 404 F. 2d 601 (1968). We granted certiorari, 395 U. S. 976 (1969), to consider the claim that the Court of Appeals was in error in not reaching a contrary result

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refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 11 was amended in 1966 and now reads as follows:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

In *McCarthy* v. *United States*, 394 U. S. 459 (1969), we held that a failure to comply with Rule 11 required that a defendant who had pleaded guilty be allowed to plead anew. In *Halliday* v. *United States*, 394 U. S. 831 (1969), we held that the *McCarthy* rule should apply only in cases where the guilty plea was accepted after April 2, 1969, the date of the *McCarthy* decision.

on the authority of this Court's decision in *United States* v. *Jackson*, 390 U. S. 570 (1968). We affirm.

I

In *United States* v. *Jackson, supra*, the defendants were indicted under § 1201 (a). The District Court dismissed the § 1201 (a) count of the indictment, holding the statute unconstitutional because it permitted imposition of the death sentence only upon a jury's recommendation and thereby made the risk of death the price of a jury trial. This Court held the statute valid, except for the death penalty provision; with respect to the latter, the Court agreed with the trial court "that the death penalty provision . . . imposes an impermissible burden upon the exercise of a constitutional right . . . ." 390 U. S., at 572. The problem was to determine "whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury." 390 U. S., at 581. The inevitable effect of the provision was said to be to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. Because the legitimate goal of limiting the death penalty to cases in which a jury recommends it could be achieved without penalizing those defendants who plead not guilty and elect a jury trial, the death penalty provision "needlessly penalize[d] the assertion of a constitutional right," 390 U. S., at 583, and was therefore unconstitutional.

Since the "inevitable effect" of the death penalty provision of § 1201 (a) was said by the Court to be the needless encouragement of pleas of guilty and waivers of jury trial, Brady contends that *Jackson* requires the invalidation of every plea of guilty entered under that section, at least when the fear of death is shown to have

been a factor in the plea. Petitioner, however, has read far too much into the *Jackson* opinion.

The Court made it clear in *Jackson* that it was not holding § 1201 (a) inherently coercive of guilty pleas: ". . . the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." 390 U. S., at 583. Cited in support of this statement, 390 U. S., at 583, n. 25, was *Laboy* v. *New Jersey*, 266 F. Supp. 581 (D. C. D. N. J. 1967), where a plea of guilty (non vult) under a similar statute was sustained as voluntary in spite of the fact, as found by the District Court, that the defendant was greatly upset by the possibility of receiving the death penalty.

Moreover, the Court in *Jackson* rejected a suggestion that the death penalty provision of § 1201 (a) be saved by prohibiting in capital kidnaping cases all guilty pleas and jury waivers, "however clear [the defendants'] guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings." "[T]hat jury waivers and guilty pleas may occasionally be rejected" was no ground for automatically rejecting all guilty pleas under the statute, for such a rule "would rob the criminal process of much of its flexibility." 390 U. S., at 584.

Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under § 1201 (a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore

fashioned by courts and since reiterated that guilty pleas are valid if both "voluntary" and "intelligent." See *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969).[4]

That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice.[5] But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.[6] On neither score was Brady's plea of guilty invalid.

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[4] The requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized. See nn. 5 and 6, *infra*. The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily; this Court has not yet passed on the question of the retroactivity of this new requirement.

[5] *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962); *Waley* v. *Johnston*, 316 U. S. 101, 104 (1942); *Walker* v. *Johnston*, 312 U. S. 275, 286 (1941); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927).

[6] See *Brookhart* v. *Janis*, 384 U. S. 1 (1966); *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275 (1942); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); *Patton* v. *United States*, 281 U. S. 276, 312 (1930).

Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, this Court has scrutinized with special care pleas of guilty

II

The trial judge in 1959 found the plea voluntary before accepting it; the District Court in 1968, after an evidentiary hearing, found that the plea was voluntarily made; the Court of Appeals specifically approved the finding of voluntariness. We see no reason on this record to disturb the judgment of those courts. Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner. It was this development which the District Court found to have triggered Brady's guilty plea.

The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. Cf. *Haynes* v. *Washington*, 373 U. S. 503, 513 (1963); *Leyra* v. *Denno*, 347 U. S. 556, 558 (1954). One of these circumstances was the possibility of a heavier sentence following a guilty verdict after a trial. It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect

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entered by defendants who pleaded guilty without the assistance of counsel and without a valid waiver of the right to counsel. See *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116 (1956); *Von Moltke* v. *Gillies*, 332 U. S. 708 (1948) (opinions of JUSTICES BLACK and Frankfurter); *Williams* v. *Kaiser*, 323 U. S. 471 (1945). Since *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), it has been clear that a guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid. See *White* v. *Maryland*, 373 U. S. 59 (1963); *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968).

The importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him and the possible consequences of his plea was at the heart of our recent decisions in *McCarthy* v. *United States*, *supra*, and *Boykin* v. *Alabama*, 395 U. S. 238 (1969). See nn. 3 and 4, *supra*.

a jury trial which could result in a death penalty.[7] But even if we assume that Brady would not have pleaded guilty except for the death penalty provision of § 1201(a), this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.

The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages

[7] Such a possibility seems to have been rejected by the District Court in the § 2255 proceedings. That court found that "the plea of guilty was made by the petitioner by reason of other matters and not by reason of the statute . . . ."

of pleading guilty. Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof.

Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient that the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations,[8] as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability

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[8] We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady's case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty.

of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.[9] It is this mutuality of advantage which perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty,[10] a

[9] For a more elaborate discussion of the factors which may justify a reduction in penalty upon a plea of guilty, see American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, § 1.8 and commentary, at 37–52 (Tent. Draft 1967).

[10] It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea. D. Newman, Conviction, The Determination of Guilt or Innocence Without Trial, 3 and n. 1 (1966).

great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas nor the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind which affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far.

Bram v. *United States,* 168 U. S. 532 (1897), held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be "free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." 168 U. S., at 542–543. More recently, *Malloy* v. *Hogan,* 378 U. S. 1 (1964), carried forward the *Bram* definition of compulsion in the course of holding applicable to the States the

Fifth Amendment privilege against compelled self-incrimination.[11]

Bram is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial. *Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But *Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more than *Miranda* v. *Arizona*, 384 U. S. 436 (1966), held that the possibly coercive atmosphere of the police station could not be counteracted by the presence of counsel or other safeguards.[12]

Brady's situation bears no resemblance to Bram's. Brady first pleaded not guilty; prior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with

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[11] *Malloy* v. *Hogan*, 378 U. S. 1, 7 (1964). See also *Haynes* v. *Washington*, 373 U. S. 503, 513 (1963); *Lynumn* v. *Illinois*, 372 U. S. 528 (1963); *Wilson* v. *United States*, 162 U. S. 613, 622–623 (1896).

[12] "The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against compelled self-incrimination]. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." *Miranda* v. *Arizona*, 384 U. S. 436, 466 (1966).

those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage. His plea of guilty was entered in open court and before a judge obviously sensitive to the requirements of the law with respect to guilty pleas. Brady's plea, unlike Bram's confession, was voluntary.

The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Fifth Circuit Court of Appeals:

> "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes)." [13]

Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.[14]

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[13] *Shelton* v. *United States,* 246 F. 2d 571, 572, n. 2 (C. A. 5th Cir. 1957) (*en banc*), rev'd on confession of error on other grounds, 356 U. S. 26 (1958).

[14] Our conclusion in this regard seems to coincide with the conclusions of most of the lower federal courts which have considered whether a guilty plea to avoid a possible death penalty is involuntary. See *United States ex rel. Brown* v. *LaVallee,* — F. 2d — (C. A. 2d Cir. 1970); *United States* v. *Thomas,* 415 F. 2d 1216 (C. A. 9th Cir 1969); *Pindell* v. *United States,* 296 F. Supp. 751 (D. C. D. Conn. 1969); *McFarland* v. *United States,* 284 F. Supp. 969 (D. C. D. Md. 1968), aff'd, — F. 2d — (C. A. 4th Cir. 1969), petition for certiorari pending, No. 830, Misc., O. T. 1969; *Laboy* v. *New Jersey,* 266 F. Supp. 581 (D. C. D. N. J. 1967); *Gilmore* v. *California,* 364 F. 2d 916 (C. A. 9th Cir. 1966); *Busby* v. *Holman,*

III

The record before us also supports the conclusion that Brady's plea was intelligently made. He was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties; once his confederate had pleaded guilty and became available to testify, he chose to plead guilty, perhaps to ensure that he would face no more than life imprisonment or a term of years. Brady was aware of precisely what he was doing when he admitted that he had kidnaped the victim and had not released her unharmed.

It is true that Brady's counsel advised him that § 1201 (a) empowered the jury to impose the death penalty and that nine years later in *United States* v. *Jackson, supra,* the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court or there was a plea of guilty. But these facts do not require us to set aside Brady's conviction.

Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing

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356 F. 2d 75 (C. A. 5th Cir. 1966); *Cooper* v. *Holman,* 356 F. 2d 82 (C. A. 5th Cir. 1966), cert. denied, 385 U. S. 855 (1966); *Godlock* v. *Ross,* 259 F. Supp. 659 (D. C. E. D. N. C. 1966); *United States ex rel. Robinson* v. *Fay,* 348 F. 2d 705 (C. A. 2d Cir. 1965), cert. denied, 382 U. S. 997 (1966); *Overman* v. *United States,* 281 F. 2d 497 (C. A. 6th Cir. 1960), cert. denied, 368 U. S. 993 (1962); *Martin* v. *United States,* 256 F. 2d 345 (C. A. 5th Cir. 1958), cert. denied, 358 U. S. 921 (1958). But see *Shaw* v. *United States,* 299 F. Supp. 824 (D. C. S. D. Ga. 1969); *Alford* v. *North Carolina,* 405 F. 2d 340 (C. A. 4th Cir. 1968), probable jurisdiction noted, 394 U. S. 956 (1969), restored to calendar for reargument, — U. S. — (1970).

leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made which in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, cf. *Von Moltke* v. *Gillies*, 332 U. S. 708 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

The fact that Brady did not anticipate *United States v. Jackson, supra,* does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that

the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth.

Although Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful.

Affirmed.

MR. JUSTICE BLACK, while adhering to his belief that *United States* v. *Jackson*, 390 U. S. 570, was wrongly decided, concurs in the judgment and in substantially all of the opinion in this case.